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Subject :—

Criminal appeals in the High Court of Bombay against the Order of acquittal from Bijapur District.

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Superintendent,
D Branch, Legal Department.

File No. Cr. A. Bij. /46.

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Judgment recorded by the High Court in Criminal Appeal No. 356 of 1945 with Revision Application No. 581 of 1945 in the case of Imperator Versus Mahadevappa Sidramappa Loni No. 2. (By Government)

The Government Pleader for the appellant.

Mr. R. A. Jahagirdar with V.H.Gumaste for the Accused.

Coram:- Sen and Gajendragadkar, JJ.

10th December 1945.

Oral Judgment (Per Sen J) :

These two matters arise out of a case tried in the Court of the Resident Magistrate, First Class, Bijapur, accused no.1 being the licensee of a cloth shop and accused no.2 his servant. The case against them was that on 7th April 1944, accused no.2 sold one pair of dhoties for a price more than that prescribed for such dhoties and thereby committed a breach of the provisions of clause 12(1) of the Cotton Cloth and Yarn Control Order 1943, the master, that is, accused no.1 being absent at the time of the sale. On that day 4 persons, Bhimappa, Adiveppa, Laxma and Nilawa went first to another shop owned by S.S.Heralgi to make purchases of some clothes required for a marriage ceremony. At that shop they made several purchases but could not get dhoties. Then two of them, Bhimappa and Nilawa, remaines the said shop while the two others, Adiveppa and Laxman, went to the shop of C.V. Heralgi which is the name of accused no.1. Accused no.2 showed them a pair of dhoties and on its being approved by Adiveppa and Laxman, sold the same for Rs.12/- and he prepared a receipt for the said sum. The two persons returned to the shop where the other purchases had been made, and almost immediately thereafter two police constables came there and took hold of the dhoties which were purchased in the accused, shop. It was found that

the said pair of dhoties had the retail price of Rs.10/15/- printed on them. Thereafter, after obtaining the requisite sanction of the Provincial Government, the two accused were prosecuted for breach of the provisions of clause 12(1) of the Bombay Cotton Cloth and Yarn (Control) Order, 1943 and the Dealer's Licence Order 1943. The prosecution examined ten witnesses, and they proved the transaction of the sale of the dhoties in question by accused no.1 at the price of Rs.12/- to Adiveppa and Laxman. The learned Magistrate who tried the case came to the conclusion that there could be no doubt that accused no.2 had sold the dhoties in question for Rs.12/-, i.e., in excess of the maximum price of Rs.10/15/-. It was also held that accused no.1 was not present in the shop when the sale took place and that the dhoties were sold without his knowledge. The learned Magistrate came to the conclusion that accused no.1 could not be held guilty, as in his opinion, the word "dealer" which occurred in clause 12(1) of the order in question "could not be taken to mean the person in whose name the licence of the shop stands". He took the view that if a person had full authority to sell anything in a shop and receive amount and passed a receipt in respect of the same, he should be considered as to dealer. Accordingly, he acquitted accused no.1 and found accused no.2 guilty and convicted and sentenced him to a fine of Rs.350 or in default to rigorous imprisonment for three months. Accused no.2 appealed to the Sessions Court and the learned Sessions Judge held that it could not be argued that a person who actually carried on the business of selling cloth, though not for his own profit but for the profit of somebody else, was not included within the expression "dealer". He further held that at least under rule 121 of the Defence of India Rules accused no.2 was liable and he accordingly confirmed the conviction and sentence and dismissed the appeal. We are of the opinion that the view taken by the trial Court regarding the meaning of the word "dealer" in clause 12(1) of the order in question cannot be supported. Clause 12(1) reads

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thus :

"No manufacturer or dealer shall sell or offer to sell any cloth or yarn at a price higher than the maximum price specified in this behalf under clause 10".

The definition of a "dealer" is given in sec. 3 of the order as follows :-

"Dealer" means a person carrying on the business of selling cloth or yarn or both whether whole-sale or retail and whether or not in conjunction with any othe business".

The question whether Clause 12(1) of the Cotton Cloth and Yarn (Control) Order 1943 places an absolute liability on the owner or the licensee of the shop, that is, irrespecti of whether he was pres nt at the time of sale or not, was raised in a case decided by this court in August 1945, namely Emperor v. Mahomed Bashir Ramjan & Anr Criminal Revision Application No. 335 of 1945. That was a case of an offence under rule 81(4) of the Defence of India Rules and was concerned with a notification issued by the Commissioner of Police, Bombay regarding the hours at nigh when hotels are required to be kept closed, and the evidence was that certain drinks were supplied in the prohibited hours by certain servants of a hotel when the proprietor himself was absent from the hotel. Mr.Justice Divatia delivered the judgment in that case and held that looking to the object with which the notification in quest had been issued by the Commissioner of Police, the case ca within the exception to the general rule that a master is not liable for the criminal acts of his servant, and the first accused, that is, the proprietor of the hotel, was found guilty under rule 81(4) of the Defence of India Rule Several cases were cited before the Bench on the question of the criminal ~~cases were cited before the Bench on the~~ liability of masters for the acts of their servants in special cases, and reliance was placed particularly on the

case of Mousell Brothers v. London and North Western Railway (1917) 2 K.B. 836 in which it was held :

> "While prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular enactment has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed".

A case decided by the Lahore High Court was also followed, namely Mangat Ram Pritam Das and Anr v. Emperor (32) 1945 Lahore 281 which was a case under the Hoarding and profiteering Ordinance. A point was raised that that case having been decided under an Ordinance, it could not be regarded as a guide on the facts of the case before their Lordships, but that point was overruled, as in both cases the object which the authority which had issued the notification or promulgated the ordinance had in view to be considered, and the object in both pieces of Legislation was held to be the same or similar. It was also pointed out in that judgment that in two earlier decisions of this court in Queen-Empress v. Tyab Alli, I.L.R. 24 Bom. 423 and in Emperor Mahadevappa I.L.R. 51 Bom. 352, the same principle had been applied, and that though in both these cases the acts constituting the offence had been committed by servants in the absence of and without the knowledge of their masters, the masters have been held guilty. The first of these cases was under sec.22 of the Arms Act and the second was a case was under ~~xxxx22x~~ the Indian Explosives Act. We think that the principle of the decision in Emperor v. Mahomed Bashir Ramjan & Anr. (Criminal Revision Application No.335 of 1945) is applicable to this case

also. The object of the Cotton Cloth and Yarn (Control) Order, so far as Clause 12(1) thereof is concerned is to prevent the sale of cloth or yarn at a price higher than the maximum price specified under clause 10 of the said order; and we think that the dealer must be held to mean the owner of the shop or the licensee and not any servant of the shop who does the actual work of taking the price and handing over the goods to the purchaser. Mr.Jahagirdar has contended that the order which has been made under rule 81(2) of the Defence of India Rules cannot authorise the Central or the Provincial Government to create a vicarious liability unless in serious matters of this kind there were express provisions to that effect in rule 81(2). In our opinion this argument has no substance, as the Central and the Provincial Governments have been given full - authority under rule 81(2) to take such steps as may be necessary to enforce the specific ends mentioned in that rule and we think that no restriction can be supposed to have been imposed on the authority in question. Prima facie they have been given as wide powers as the Legislatu itself might possess in attaining the ends specified.Mr. Jahagirdar has next contended that looking to the words of Clause 12(1), namely, "No manufacturer or dealer shall sell or offer to sell", it was for the prosecution to show that the dealer actually sold in person the articles in question. We do not think that there is any force in this contention also, as sales may be effected through or by a servant just as much as in person by the dealer. The next contention that Mr.Jahagirdar has urged is that the prosecution ought to have established that it was accused no.2's ordinary duty to sell cloth on behalf of his master. He has urged that supposing no such duty had been imposed on accused no.2, for instance, if he had been a mere watchman on the premises, and he effected the sale in the -

absence of his master, the master could not be held liable for such an act. In this case, however, there is clear evidence that accused no.2 issued a receipt in the name of the shop and that, therefore, prima facie ha made no profit out of the transaction in question for himself. He was prima facie therefore, acting for the shop, that is, for his master, and we do not therefore think that it was necessary for the prosecution to show that the duty of selling cloth for the shop was specifically assigned to accused no.2. We,accordingly, hold that accused no.1 must be held to be the dealer and as such liable if the sale is proved. On that point Mr.Gumaste on behalf of the appellant has urged one or two points. In the first place, he has contended that the prosecution has not sufficiently proved that the dhoties which were attached by the police were actually the dhoties which were sold by accused no.2. On this point, however, we have the evidence of the two purchasers Adiveppa and Laxman who state that the dhoties which were attached, were the same as the ones which they had purchased from accused no.2. The panchas have put their signatures on the dhoties themselves and there is no evidence that any other dhoties were purchased by Adiveppa Laxman or the two other members of the party. There can be no doubt, therefore, on this point. On the evidence, therefore, it is clear that two dhoties were sold by accused no.2 at a price which exceeded the maximum price prescribed under the order.In our opinion, therefore, the learned Magistrate was wrong in holding that accused no.1 was not liable for breach of the clause 12(1) of the Cotton Cloth and Yarn (Control) Order 1943. We, accordingly, allow the appeal and set aside the acquittal of accused no.1, and we convict him under clause 81(4) of the Defence of India Rules. As to the sentence, it seems likely that accused no.1 will have to pay the fine that has been imposed on his servant accused no.2, namely, Rs.350/-. In the circumstances we think that a similar fine on accused no.1 will meet the ends of justice in this case. We, accordingly, sentence him

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to a fine of Rs.350/-.

2. As regards the Revision Application, we think that accused no.2 cannot be held to be the dealer in this case. We find that in Sardarilal Vaid vs. Imperator (Criminal Revision Application No.184 of 1945) the same question arose. In that case the manager of a shop was held criminally liable under sec.13 of the Hoarding and Profiteering Prevention Ordinance 1943. It was remarked by Weston, J. "We do not understand that it can be said that a manager of a shop selling articles is not a person carrying on the business of selling the articles" and on this view the conviction of the manager was upheld. With respect, we believe that the expression "carrying on the business of selling" necessarily implies the existence of a present primary interest in such business and is not intended to include every person concerned in the physical incidents of the sale, e.g. receiving money or handing over the goods to the purchaser; and in our opinion, in the present case, accused no.2, the servant of accused no.1, cannot be held to be the dealer within the meaning of the definition of that expression. We think however, that the learned Sessions Judge was right in the view that he took as regards accused no.2, namely that he was liable for abetment of the contravention of the Order, under rule 121 of the Defence of India Rules. Mr. Gumaste has urged that accused no.2 cannot be said to have the requisite intention in this case where the principal offence does not require mens rea. That appears to us to be an altogether untenable contention. It is clear from the fact that the price was marked on the dhoties in question and that they were sold at a higher price by accused no.2 that he knew that he was selling the articles in contravention of the order; and, therefore, he had the necessary intention to aid accused no.1 in making a profit higher than what was authorised and thus in committing the offence. The conviction of accused no.2 was, therefore, justified and his application must, therefore, be dismissed

Mr. B.Y. Angadi Pleader 9 ✗ 45

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Record Keeper.

In the court of the Sessions Judge,

At Bijapur. [Exh. 71.]

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Sessions case No. 28 of 1945.

Emperor.

Vs.

1. Rama Dundappa Katikar.
2. Dastgir Hasansaheb Bomanjogi.
3. Shivabasappa Madivalappa Hadapad.
4. Ravta Jampanna Katikar.
5. Dastgir Mahaboobsab Mannur alias Tasedavar.

All of Hippargi.

Offence:- Sections 148, 326 and 302 read with section 149 Indian Penal Code.

Judgment.

The charge against the five accused is that on the 8th March 1945 at Hippargi they formed an unlawful assembly with the common object of causing the death of Adiveppa and Aminsa Bagwan and that in prosecution of the common object of the unlawful assembly they voluntarily caused grievous hurt to Adiveppa with deadly weapons and intentionally caused the death of Aminsa Bagwan and thereby committed offences punishable under Sections 148, 326 and 302 read with section 149 of the Indian Penal Code.

2. The case of the prosecution is briefly this.-

Adiveppa Metgar (Exh.6) was engaged by a toddy contractor Sripati(Exh.13) to watch his toddy palm grove at Bomanjogi. These 5 accused and some others were friendly with

Adiveppa and used to go to the grove and receive toddy gratis from him. The owner on coming to know of this asked Adiveppa not to supply toddy gratis to any one and so Adiveppa stopped giving toddy gratis about 3 months before the commission of this crime. The accused then began to commit mischief in the palm grove and report to the owner Sripati that Adiveppa was committing the mischief and that he should be removed from the position of watchman and that they should be employed in his place. Sripati did not however agree to this. The accused then continued committing mischief by breaking the toddy pots at night. Adiveppa had a friend Aminsa Bagwan who used to accompany him to palm grove whenever he came to Hippargi. On the night of Wednesday, 7-3-1945, Adiveppa and Aminsa together went to the palm grove at about 4 hours after dark. At about 3 hours to sunrise Adiveppa heard the noise of the pots being broken and he and Aminsa raised a cry. The mischief makers began to run away and Adiveppa and Aminsa gave them a chase. In the moonlight Adiveppa and Aminsa saw that these 5 accused and Kalesa and some others were the mischief makers. They caught Kalesa (Exh.12) and were taking him to the owner but Kalesa gave them a slip and again ran away. They then went to the house of accused 2, but found that he was not at home. They then caught Kalesa again near the chavadi and began to beat him, but Tuljaram and Dastgir (Exhs. 9 and 10) came there and rescued him and he ran away to his field at Satihal. Thereafter Adiveppa and Aminsa were going to the toddy shop and on the way they found Shivabasavu (accused 3) and they caught him and on his admitting his guilt they were taking him to the police station. On the way, Kallapagouda (Exh.11) saw them and questioned them. He rebuked them all and sent them away. Adiveppa then went to the toddy shop and Aminsa went home.

3. At about noon that day Hingya Chalwadi(Exh.14) came to the shop with toddy from the Domanjogi palms. Adiveppa took him to the inner room of the shop to ascertain from him the details of the mischief the previous night. When they were sitting talking together, accused 1 to 4 rushed into the room armed with axes and

sticks and began to beat Adiveppa. Ningya, the owner Gripati who was in the shop and some customers who were also in the shop then took a fright and ran away. They saw that accused 1 to 4 had entered the room where Adiveppa was and were beating him and that accused 5 was standing outside the shop armed with a stick. After severely beating Adiveppa they left him and proceeded towards the chavdi. Aminsa was there below the verandah talking to Abu Bakar(Exh.18) when Aminsa saw these accused coming armed with axes and sticks he at once realised that they came to beat him and took shelter behind Abu Bakar. Accused 2 asked Abu Bakar to move aside and then delivered a stick blow to Aminsa's head. He dropped down. Accused 1 and 3 then delivered axe-blows on his legs and accused 4 and 5 stood at some distance armed with sticks perhaps keeping a watch. Aminsa's he hew Hatbusa a boy of 10 years (Exh. 24) was playing with marbles in the chavadi and he raised a cry. Aminsa's Mother Davalma (Exh. 25) came running from her house which very near the chavadi. All the five accused then ran away. She and the other people who were at the chavdi found that Aminsa was dead.

4. Information reached the Police Head constable Miyasab (Exh. 47) of the beating given to Adiveppa and he went to the toddy shop and recorded the statement of Adiveppa. He then registered the crime and sent for panchas and on their arrival got a panchanama Exh. 31 made of the injuries on Adiveppa. He noticed that an axe with a broken handle (Art.1) lay there and blood on the floor. He attached that axe and also some that there was/blood stained earth Art. 6 by making a panchanama Exh. 32. He then sent Adiveppa to the Civil Hospital in this town for treatment. He then came to know that Aminsa was murdered at the chavadi. Before he could go there Jamadar Hydersab (Exh.47) arrived there and took over further investigation from him. He went to the chavadi and saw the dead body of Aminsa lying on the road in front of the chavadi. His father Huseinsa (Exh. 27) was there and his statement Exh. 28 was recorded and that crime too was registered. An inquest was held over the dead body by making a panchanama Exh. 33 and a panchanama Exh. 34 of the scene of the offence was also made and some blood stained earth was attached

articles, the earth, the axe found in the toddy shop, the weapons attached from the accused and the clothes attached from the person of the accused and the dhoti in the house of accused 4, arts. 1, 6 to 9, 11 and 13 to 27 were sent to the Chemical Analyser, Bombay. On the same day a charge sheet was sent against the five accused to the Resident Magistrate, First Class, Bijapur The Chemical analysis showed that there was human blood on the earth attached at the toddy shop and on the earth in front of the chavadi where the dead body of Aminsa lay and on the shirt Art.14 attached from the person of accused 4. No blood was detected on any of the weapons attached and though blood was found on some of the clothes, its origin could not be determined because the elements were disintegrated.

6. On these materials the Resident Magistrate, First Class, Bijapur, held an inquiry and committed the 5 accused to this court to take their trial for rioting with deadly weapons, voluntarily causing grievous hurt with deadly weapons to Adiveppa and intentionally causing the death of Aminsa in prosecution of the common object of the unlawful assembly of the five accused, offences punishable under sections 148, 326 and 302 read with section 149 of the Indian Penal Code.

7. All the accused deny the charge. According to them they never took part in the beating given to Adiveppa or in causing the death of Aminsa and they have been falsely involved on account of enmity between them and Adiveppa and the police. The accused have led no evidence on their behalf.

8. So the points for determination in this case are:-

(1) Whether any of the accused voluntarily caused grievous hurt with deadly weapons to Adiveppa ?

(2) Whether any of the accused caused the death of Aminsa Bagwan ?

(3) Whether these acts were committed in prosecution of the common object of the unlawful assembly of these five accused of causing the death of Aminsa and Adiveppa ?

(4) Which of the accused, if any, is guilty ~~of that~~ and what-Bus offence ?

9. My findings are:-

(1) Yes. (2) Yes. (3) These acts are committed in

prosecution of the common object of the unlawful assembly of the accused 1 to 3 and some others to cause grievous hurt with deadly weapons to Adiveppa and Aminsa.

(4) Accused 1 to 3 are guilty under Section 326 read with section 149 and accused 4 and 5 are not guilty of any offence.

10. There can be no doubt from the evidence that on the noon of 8-3-1945 some one or more persons caused grievous hurt with deadly weapons to Adiveppa and that about the same time some one or more persons caused the death of Aminsa by beating him with axes and sticks. The learned pleader for the accused have not disputed that the prosecution has proved that grievous hurt with deadly weapons was caused to Adiveppa and that death of Aminsa was caused. The accused do not deny that Aminsa is dead. Nor do they deny that Adiveppa was beaten on the noon of Thursday, 8-3-1945. Adiveppa (Exh. 6) has sworn that he was beaten in the toddy shop. His master Siripati(Exh.13) and his colleague Mingya (Exh.14) and two other witnesses Dharmaji (Exh.15) and Hanmant (Exh.16) who were in the toddy shop at the time of the alleged assault have sworn that Adiveppa was beaten when he was in the toddy shop. When the police went to the place on coming to know of the offence, Adiveppa made a statement Exh. 7 in which he said that he was beaten with sticks and axes. Blood was found to have fallen on the floor ofthe padsali of the toddy shop and bloodstain earth Art. 6 was attached from there. The chemical analysis (vide Exhs. 52 and 53) disclosed that that earth was stained with human blood. An axe with a broken handle Art. 1 was found lying in the padasali of the toddy shop by the police. Adiveppa was sent immediately to the Civil Hospital in this town and he was examined by the Medical Officer (Exh. 48) and treated for injuries which were noted down by him correctly in the certificate Exh. 49. His evidence read with the certificate will show that there were as many as 22 injuries all over the body of Adiveppa and that there were several incised wounds, weal marks and contused wounds. The left ulna was fractured. He was treated as an indoor patient for

more than 20 days in which period he was unable to follow his ordinary pursuits of life. There can therefore be no doubt tha the prosecution has proved beyond any doubt that some one or more persons voluntarily caused grievous hurt with deadly weapons to Adiveppa on the noon of 8-3-1945.

11. Similarly, there can be no doubt that the prosecution has proved beyond any doubt that some one or more persons intentionally caused the death of Aminsa Bagwan. His dead body was found by Jamadar Hydersa lying in front of the Chavadi on the afternoon of 8-3-1945. He held an inquest over the dead body by making the panchanama Exh. 33 proved by the panch (Exh.30) and sent the dead body with Constable Mahadev (Exh.36) to the Medical Officer at Sindgi for post mortem examination. That officer (Exh. 50) found that there were six ante mortem surface injuries and wounds on the body of Aminsa described by him in para 17 of the memorandum of post mortem examination Exh. 51 and that death was due to shock and haemorrhage as a result of these injuries. According to him, th lacerated incised wound No. 6 might have been caused by a weapo like a sword and the incised wound No. 3 might have been caused by an axe and the incised wounds Nos. 4 and 5 might have been caused by some sharp instrument. In his opinion these injuries were sufficient in the ordinary course of nature to cause death and injury No. 6 by itself was sufficient in the ordinary cours of nature to cause death because it was 8" x 4" and had cut the muscles, blood vessels, nerves and the tibia. Although the part of the body on which this wound was inflicted was not a very vital one being the upper third of the inner aspect of the right leg and back of right knee, the Medical Officer has state that big arteries, veins and nerves pass through that part of t body and it is a vital part to some extent. From the nature of the weapons used and from the part of the body chosen and from the force used in delivering the blow with a weapon, it will be clear that the intention of the assailant who-so-ever he may be must have been to cause death or at any rate to cause such

bodily injury as was likely to cause death. There can therefore be no doubt that some one or more persons intentionally caused the death of Aminsa Bagawan on the noon of 8-3-1945.

12. The main question and the only question in dispute in this case is whether these accused took part in causing grievous hurt to Adiveppa and in causing the death of Aminsa and whether they did so in prosecution of the common object of the unlawful assembly to cause death. The prosecution relies on the direct evidence of several witnesses who witnessed the beating given to Adiveppa in the toddy shop and to Aminsa in front of the chavadi and also on the evidence of motive for these five accused to form an unlawful assembly with the common object of causing the death of Adiveppa and Aminsa and on the circumstantial evidence that the accused were absconding for sometime and that there was human blood on the shirt of accused 4 and blood on the clothes of the other accused. It has therefore to be seen whether all this evidence has established beyond reasonable doubt the guilt of any of these five accused.

13. Adiveppa (Exh.6), who has luckily surviving the 22 injuries inflicted on him, has sworn that accused 1 to 4 entered the toddy shop and beat him with axes and sticks and that he held one of the axe used against him and that its handle broke and tha the assailants left the axe blade with the broken handle there and went away taking him to be dead. He is supported by four eye-witnesses Sripati (Exh. 13) his master, Ningya (Exh. 14) his colleague, Dharmaji (Exh.15) and Hanmanta (Exh.16) who were customers in the shop at the time. All these four witnesses say that when Ningaya and Adiveppa were talking into the inner room of the toddy shop, accused 1 to 4 rushed into that room with sticks and axes and began to beat Adiveppa and that they all ran away. Ningya, Sripati and Hanmant also say that when running away they saw accused 5 standing armed with a stick at some distance from the outer door of the toddy shop. In his statement Exh. 7 made by Adiveppa to the Head Constable immediately after he was beaten, Adiveppa has mentioned that Ningya Chalvadi was talking to him and that Bhimapp

Padevar, Kallappa Agasar, Dharmanna Talikoti and many others were in the shop and that accused 1 to 4 and some others came to the toddy shop and that accused 1, 2 and 3 carried axes and that the rest carried sticks and stones and that accused 1, 2 and 3 rushed into the room and began to beat him and that they went away saying that they would cut Aminsa Bagawan and Kallapagouda. In that statement he has not mentioned that accused 4 entered the room and began to beat him. He has no doubt mentioned accused 4 in the beginning and has said that all those whom he mentioned before came to the toddy shop and that accused 1, 2 and 3 were armed with axes and that the rest were armed with sticks and stones. Even there, he has not mentioned accused 5. Nor has he mentioned that accused 5 was one of those who had gone to the toddy palm grove the previous night. He has instead mentioned one Basappa Jamadar and Bashya Naidar. The learned public Prosecutor urges that Adiveppa being in agony on account of the severe beating he may have omitted to mention accused 5 as one of those who had come to the toddy palm grove the previous night and that he might have omitted to mention accused 4 as having entered the room and beaten him. But the head constable does not say that Adiveppa was in very great agony when he recorded his statement and could give answers with difficulty. It is true that there is no reason why the toddy contractor Sripati and his servant Ningaya and his customers Dharmaji and Hanmant should give false evidence against any of these five accused though Hanmant is the owner of the building in which the toddy shop is held and though Sripati is Adiveppa's master and Ningya is his servant and Dharmaji used to get toddy on credit from Sripati. But it is likely that they may be committing a mistake about accused 4. Kallappa Agasar and Bhimappa Padevar were not cited by the Sub Inspector as witnesses in the charge sheet because in his opinion the four eyewitnesses were enough. They were however called by the Public Prosecutor to this court and were put into the witness box and the learned pleaders for the accused declined to cross-examine them. No adverse inference can therefore be drawn for not examining Kallappa and Bhimappa as witnesses in

this case. There is no reason why Adiveppa himself should falsely involve the accused 1, 2 and 3. It is true that in the committal court he admitted that there were factions in his caste of Kabbalgers and that he belonged to one faction and that the accused 1 belonged to another. His complaint was recorded by the head constable immediately after the offence and when he was alone. It cannot therefore be said that he had any time for deliberations and for falsely involving the accused 1 to 3 who, is said, had entered his room and had beaten him. I therefore believe Adiveppa and the other witnesses when they say that the accused 1 to 3 entered the shop building and beat Adiveppa with axes and sticks. The learned pleader for the accused 1, 3 and 4 has urged that there being no blood or stone in the room of the toddy shop, the story that the beating was in the room of the toddy shop should be disbelieved. He also urges that Adiveppa having in his statement Exh. 7 said that he was dragged to the yard and was beaten there, his present version that he was brought to the Padsali and beaten there should not be believed. The Padsali has no roof and no walls to enclose it and so it is as good as a yard. It does not appear that the plinth of the Padsali is very high. So merely because in the statement Exh. 7 he has stated that he was dragged to the yard and was beaten there and because he now says that it was in the padsali that he was beaten. I do not think, I should refuse to rely on him. The other witnesses did not witness the beating in the Padsali or in the yard because they ran away as soon as the four accused entered the room with axes and sticks and began to beat him. Because the toddy shop is in a crowded locality where there were other shops and also a motor stand and because no other witnesses are called, it cannot be said that the evidence given by the prosecution should be disbelieved. In addition to this evidence, there is the evidence of Mallayya (Exh. 17) who has a tea shop between the toddy shop and the chavdi. He saw the accused 1 to 5 running from the side of the toddy shop with sticks and axes towards the chavadi. Half and hour later became to know that Aminsa was murdered. When cross-examined whether he had informed anybody else of his having seen the five accused, he said that he had informed a police constable

who came there shortly thereafter. Because that police constable is not examined, it is urged that he should not be believed. That constable seems to be Narayan. He was called and put into the box but his cross examination was declined by the learned pleaders for the accused. So because that constable has not been examined it cannot be said that Mallayya's evidence should be discarded.

14. Then there is the evidence of Abu Bakar (Exh.18), Bhimanna (Exh.19), Lal Mohamad (Exh.21) and Shardul (Exh.23) who saw these five accused beating Aminsa near the Chavadi. Abu Bakar and Aminsa were standing in front of the Chavadi on the road talking together and Abu Bakar has said that these five accused came running from the side of the toddy shop armed with sticks and axes and that accused 2 asked him to move aside and beat Aminsa with a stick on the head and that Aminsa then dropped down and accused 1 and 3 gave him axe blows on the legs and that accused 4 and 5 were standing on the road and that Aminsa's nephew Habbusa raised a cry and Aminsa's mother Davalma whose house is near the Chavdi-20-24 yards from the place of the murder - came there and that the accused left him and ran away and that when he went to Aminsa he found that his life was extinct. There is nothing in his cross-examination to show why he should not be believed. He could not say whether any of the axes and sticks in court were those used by the accused. Abu Bakar does not say that accused 4 and 5 carried any sticks. He only said that they were standing at a distance of 8-10 yards from where Aminsa lay.

15. Bhimanna (Exh.19) said that when he was on the katta of the chavdi that noon Aminsa came there from the side of the house and he and Abu Bakar stood talking below the katta, that 5 persons then came running from the side of the Post Office i.e. the toddy shop, that they were these five accused and that accused 1 and 3 carried axes and that the others carried sticks and that accused 2 gave a blow to Aminsa on the head and that he dropped down and that accused 1 and 3 then struck him with axes on his legs and that Habbusa raised a cry and then Aminsa's

mother came from her house and the five accused ran away. There is nothing urged against this witness also except that he did not raise any cry or did not go to rescue. When he sees the accused armed with sticks and axes, it is difficult to expect him to go to rescue or to raise any alarm. I am therefore unable to find any reason why he should not be believed.

16. Lal Mohamad and Shardul (Exhs. 21 and 23) were also on the katta of the Chavdi. They have also given the same evidence as that given by Bhimanna who was with them on the katta. Nothing is urged against these two witnesses also as to why they should give false evidence against any of these five accused.

17. Habbusa (Exh. 24) is a nephew of Aminsa living with him. He is a boy of hardly 10 years. It is no doubt easy to tutor him. But from the complaint Exh. 28 which his grand-father filed to the police Jamadar shortly after this crime it is mentioned that this boy was one of the eye-witnesses to this crime. The boy has also given the same evidence as that given by the other persons on the katta of the Chavadi. He has however added that the accused 4 and 5 were standing with sticks and stones on the road though the other witnesses have not stated that they had any weapons in their hands and though Abu Bakar has clearly stated that they had nothing in their hands.

18. Lastly, Davalma (Exh.25) is the mother of the deceased. She said that at about noon she heard the cries of her grandson and ran to the chavdi to see what the matter was and that when running she saw that her son had fallen on the ground and that accused 1 and 3 were cutting him with axes and that accused 2 was standing very near accused 1 and 3 carrying a stick and that accused 4 and 5 were standing at some distance carrying sticks and that as soon as she went to him all the five accused ran away. It is urged that this woman must have been selling vegetables at the time of the offence and could not have seen anything. She was tried to be contradicted by her statement to the Police, when she said that she was at home that day and that her daughter-in-law had gone to sell vegetables. Even in the statement to the police she has stated that she had returned at 4-5 hours after sunrise after

selling vegetables. She is an old woman and so has forgotten whether on that day she had gone to sell vegetables or not. At any rate, she had returned to her home much before the commission of the crime. Her husband in his complaint Exh. 28 mentioned that she had witnessed the crime. That complaint was filed before there was any time for deliberations. In the committal court she said that the accused 2, 4 and 5 had also stones in their hands. It may be that on account of failure of memory that she mentions stones also. Even if the evidence of the boy Habbusa and the mother Davalma is discarded as interested, there is the evidence of the four disinterested witnesses Abu Bakar, Bhimanna, Lal Mohamad and Shardul to show that the accused 1 to 5 took part in beating Aminsa to death and this evidence cannot be rejected only because the weapon used is more like a sword according to Medical opinion than like an axe according to these witnesses.

19. It is urged on behalf of the accused 2 that because there was enmity between him and Adiveppa and because there was enmity between him and the police Jamadar Hydersa, he has been falsely involved. But it will appear from the evidence of the Head constable Miyasab (Exh.37) that even before Hydersa returned to the police station and took over investigation of this case, accused 2 was involved by Adiveppa in his statement Exh. 7.. So from the evidence on record, there can hardly be any doubt that accused 1 to 3 voluntarily caused grievous hurt with deadly weapons to Adiveppa and that they caused the death of Aminsa. As regards accused 4 and 5 although accused 4's name is mentioned in the complaint Exh. 7 as one of those who came along with the other accused armed with sticks and axes, Adiveppa did not mention in Exh. 7 that he entered the room and beat him. Accused 5 is not mentioned as one of those who had gone to the toddy shop or who had come armed with sticks and axes. It is true that Adiveppa did not go out and see whether accused 5 was keeping guard outside and so could not have said whether accused 5 was there or not. But Dharmaji (Exh.15) who is the only independent witness does not mention that he saw accused 5 standing at the door. Further there

is no reason why accused 4 and 5 should stand at a distance of 8-10 yards from the accused 1 to 3 when they killed Aminsa. Abu Bakar is definite that they carried nothing in their hands although the other witnesses said that they carried sticks and although Davalma in the committal court stated that they carried sticks and stones. So the case of accused 4 and 5 is not entirely free from reasonable doubt. It may be that they were mere spectators just like the others when accused 1 to 3 killed Aminsa and therefore I am inclined to give them the benefit of the doubt. B C

20. The prosecution relies on the evidence of motive for the commission of this crime. Adiveppa said that the five accused were getting toddy gratis from him until three months before this crime and that on his master coming to know of it and on his master's asking him not to give toddy gratis to anybody, he stopped giving toddy gratis and that the accused then went to his master and told him that Adiveppa was selling toddy stealthily and asked him to remove Adiveppa from his service and to engage them. His master Sripati corroborates him by saying that the five accused had come to him with a request to engage them after removing Adiveppa and that he said that he would not accept their proposals and told them that Adiveppa was in his service from a long time and that it did not appear to be right to discharge him. It will appear from the evidence of Tuljaram (Exh.9), Dastgir (Exh.10) Kallapagouda (Exh.11) and Kalesa (Exh.12) that Adiveppa and Aminsa had together gone to the toddy palm grove the previous night for keeping a watch and that they chased the mischief makers and caught Kalesa and that they then were taking accused 3 to the police station for his having been one of the mischief makers and that they beat him in the presence of Kallapagouda and that they let him go on the intervention of Kallapagouda. In the complaint Exh. 7 which has been filed very shortly after the offence against Adiveppa and when he was lying alone with grievous hurt in the toddy shop, he has referred to the incident of the previous night and also to the catching of Kalesa. It is true that he does not refer to the taking of accused 3 to the

police station and the interference of Hallapagouda, but he has mentioned that when the accused were going away after beating him they said that they would cut Aminsa Bagwan and Hallapagouda. It would therefore appear that because Adiveppa wanted to take accused 3 to the police station he and his friends designed to beat him and Aminsa and that the evidence given about the motive is reliable.

21. The prosecution has also relied on the circumstance that the 5 accused were absconding and that accused 4's shirt (Art. 14) was stained with human blood. It will appear from the evidence that all the 5 accused were found by a Head Constable on the same day 18-3-1945 immediately after the order given to him on 17-3-1945 for their arrest. I am not prepared to believe that the accused were really absconding. It may be that they were in their fields and that the police did not really make any serious attempt to find them. Chidambar who is said to have arrested them has not been called to say that he found them all in the Nullah of Chatarki. The finding of human blood on the shirt of accused 4 does not seem to be of any significance because one who washed his dhoti and allowed it to dry in his house would not wander with a bloodstained shirt for a period of 10 days. So taking the evidence on record as a whole I am convinced that it is proved beyond reasonable doubt that accused 1 to 3 took part in voluntarily causing grievous hurt with deadly weapons to Adiveppa and in causing the death of Aminsa Bagawan. Although I am satisfied that there were two others or even more, with the accused 1 to 3, I am not satisfied from the evidence that they were accused 4 and 5. I am also not satisfied looking to the motive for the commission of the crime that the accused 1 to 3 and others intended to cause the death of Aminsa or of Adiveppa. The injuries caused to Adiveppa were not very serious. If they wanted to cause his death they would have done so by giving him some hard blows on some vital parts. Adiveppa now says that they left him taking to be dead, but he did not say so in his complaint Exh. 7. It will appear from the injuries on Aminsa that injury

No. 6 was the fatal injury and that the other injuries were not sufficient to cause his death. It may be that one of the accused delivered a blow with a very great force on the leg, not knowing that that might cause his death. Leg is not considered as a vital part. If they had intended to cause the death of Aminsa they would have given him that hard blow on some vital part like the head or the chest, especially when they had made him fall down on the ground before delivering that blow. I am therefore inclined to think that the common object of the unlawful assembly was only to cause grievous hurt with deadly weapons and not to cause death and that because Aminsa has died as a result of one blow given on a part which is not vital, I do not think I would be justified in convictin the accused of murder. I think that they can be convicted only under section 326 read with section 149, Indian Penal Code.

22. All the assessors are unanimous in the opinion that accused 1 and 3 are guilty under section 326. They are also unanimous in the opinion that accused 4 is also guilty under section 326. They are equally divided in their opinion about the accused 2 and 5, two of them saying that they are not guilty and two of them saying that they are guilty. They are all unanimous in the opinion that none of them is guilty of murder. Two of the assessors who said that they are not guilty have in their reasons said that there is no sufficient evidence against accused 2 and 5 and that it is possible that accused 2 is involved because he gave evidence against the police. To me it appears that there can be no doubt about the guilt of accused 2, because he has been involved by Adiveppa even before Hydersa, against whom he had given evidence, undertook the investigation. Even the Muslim witnesses like Abu Bakar, Lal Mohamad and Chardul have involved the accused 2 who is a Muslim. I am therefore unable to agree with the opinion of the two assessors who said that accused 2 was not guilty. As regards accused 4, although the assessors are unanimous in the opinion that he is guilty. Adiveppa in his complaint Exh. 7 not having mentioned him as one of those who entered the room and the other witnesses having said that he was standing at a distance of 8-10 yards when Aminsa was being beaten and Abu Bakar having said that he

carried nothing in his hands, I think I should give him the benefit of the doubt and acquit him. As regards accused 5, the assessors are equally divided in their opinion. Because he is not mentioned in Adiveppa's complaint at all and because he is said to have stood at a distance of 8-10 yards when Aminsa was beaten and because Abu Bakar said that he carried nothing in his hands, I think I should give him also the benefit of the doubt and acquit him. The result therefore is that accused 1, 2 and 3 are guilty under section 326 read with section 149 of the Indian Penal Code and the accused Nos. 4 and 5 are not guilty of any offence.

23. The question of sentence alone remains. The accused have caused as many as 22 injuries to Adiveppa and they have caused grievous hurt to Aminsa which caused his death instantaneously. They have done so because the victims wanted to charge them with committing mischief in the toddy palm grove. In order to check commission of such crimes for such trifling reasons, I think I should award a deterrent sentence to the accused. I therefore sentence each of the accused to rigorous imprisonment for a term of seven years.

Order.

24. The accused 1 to 3 are convicted of voluntarily causing grievous hurt with deadly weapons in prosecution of the common object of the unlawful assembly of themselves and two or more others, and under section 326 read with section 149 I.P.C. each of them is sentenced to rigorous imprisonment for a term of seven years.

Accused 4 and 5 are found not guilty and are acquitted of the charge and set at liberty.

22nd September 1945.

Sd. M. B. Honavar,
Sessions Judge.

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Sectioner.

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Judgment recorded by the High in Criminal Appeal No. 604 of 1945 in the case of Emp. Vs. ~~Tukkappa Shidappa Mengade.~~ Ravta Jampanna Natikar.

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The Government Pleader for the Crown.
Mr. N. M. Hungund for the accused.

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(Coram: Sen and Gajendragadkar.)JJ.)

3rd September 1946.

Oral Judgment (Per Sen,J.)

This is an appeal by the Government of the Province of Bombay against the acquital of accused No.4 Ravta Jampanna Natikar who also with 4 others accused persons, namely accused Nos. 1, to 3 and 5, were tried for offence punishable under Secs. 148, 326 and 302 read with Se. 149 of the Indian Penal Code Accused Nos. 1 to 3 were found guilty of voluntarily causing grievous hurt with deadly weapons in execution of the common object of the unlawful assembly composed of themselves and two or more other persons and sentenced under Sec. 326 with sec. 149. Accused Nos. 4 and 5 were acquitted. The prosecution case was briefly as follows. One Adiveppa was engaged by a toddy contractor named Sripati to watch his toddy palm grove. The five accused and some others used to receive toddy gratis from him but the owner put a stop to this free supply of toddy and thereafter they became inimical towards Adiveppa and his firend Aminsa who used to accompany him to the palm grove.

On the 7th March 1945 about 3 hours before sunrise the accused and some others began to break pots of toddy and were chased by Adiveppa and Aminsa; and though one of th them was caught they all ultimately escaped. About noon on the same day one Ningya had come to the toddy shop where Adiveppa as well as Sripati were present. Accused Nos. 1 to 4 rushed into the shop armed with axes and sticks and gave Adiveppa a severe beating resulting in 22 injuries on his person. Thereafter they as well as accused No. 5 proceeded towards the Chavdi where Aminsa was talking to Abu Bakar. Aminsa took shelter behind Abu Bakar but he was given severe blows with the axes carried by accused Nos. 1 and 3, accused No.2 giving him a stick blow on his head. At that time accused Nos. 4 and 5 stood at some distance armed with sticks. Aminsa died shortly thereafter. On these facts the accused were tried for the offence of causing - grievous hurt to Adiveppa with deadly weapons in - prosecution of the common object of the unlawful assembl and also intentionally causing the death of Aminsa pursuant to the same common object. With regard to the incident in which Adiveppa was beaten the witnesses are Adiveppa himself, Sripati, Ningaya and tow others named Dharmaji and Hanmantappa. As to the second incident whi occurred near the chavdi the witnesses are Abu Bakar, Bhimanna, Lal-Mahamad, Shardul, Habbusa and Davalma, the mother of Aminsa. The learned Sessions Judge, howev has acquitted accused No. 4 particularly on two grounds with regard to which it is the contention of the learned Government Pleader that he has misread the evidence and, therefore, misdirected himself. As to the first - incident, according to the learned Sessions Judge, Adiveppa did not mention in his complaint that accused No. 4, entered the room and beat him. -x----------

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On a reference to the complaint, however, we find it stated ; " Immediately coming, Dastgir Bommanjogi (that is accused No.2) Ravata Matikar (accused No.4) and Shiva aya (accused No. 3) entered the room and began to beat me all at once." The alleged statement, therefore, has not been correctly read by the learned Judge. With regard to the second incident according to the learned Sessions Judge Abu Bakar is definite that accused Nos. 4 and 5 carried nothing in their hands. This again is not correc according to the Kanarese record. Though in the English record it is stated that they, accused Nos. 4 and 5, carried nothing, according to the Kanarese record the sentence should be ; " they carried nothing but sticks". The evidence of the remaining witnesses, inspite of sligh discrepancies, all support the prosecution case that the time when Adiveppa was beaten accused No.4 had entered the shop armed with a stick with which he along with the other accused beat Adiveppa, and that, as regards the second incident, though the actual beating of Aminsa was done by accused Nos. 1 to 3, accused Nos. 4 and 5 each armed with a stick, stood at some distance from the place. There is also the evidence of one Mallayya who saw all the 5 accuse running from the toddy shop towards the Chavdi armed with sticks. He also says that he met a police constable abou 5 minutes after the accused had run away from the shop and Mr. Hungund has contended that the prosecution ought to have examined this constable also. But if the constable came after the accused ran towards the chavdi he would not be able to depose to anything unseful to the prosecuti there is no reason why this witness Mallayya should not be believed with regard to what he says, and if he is believed there can be no doubt that accused No.4 accompanied accused os. 1 to 3 animated by the common object of the latter.

With regard to the second incident, the

evidence

evidence is that accused Nos. 4 and 5 both stood at some distance from the place where Aminna was beaten by accused Nos. 1 to 3 . Mr. Hungund has contended that as the evidence as regards this incident is the same with regard to accused Nos. 4 and 5 and as accused No. 5 has been given the benefit of doubt, accused No.4 als should be given a similar benefit. He has also pointed out that there is some discrepancy as to the weapons carried by accused Nos. 4 and 5 on the second occasion, some witnesses saying that they carried sticks and some that they carried sticks as well as stones. Accu No. 5 appears to be lucky in having been given the benefi of doubt as regards this incident, but we have no doubt that the evidence as against accused No.4 with regard to this incident is altogether satisfactory and we do not think that the discrepancy as regards the weapons carried by him is material. It is true that on the second occasion accused No.4 did not take an active part but the fact that he accompanied accused Nos. 1 to 3 to c come near the chavdi clearly indicates that his intention was to prevent interference with the assault on Aminna. It thus appears to us that the two grounds on which the learned Sessions Judge has based the acquittal of accused No. 4 really do not exist on the evidence, and we are satisfied on a consideration of the evidence that accused No. 4 was concerned in both the incidents and was actuated by the same common intent with which inspired accused Nos. 1 and 3- His acquittal, therefore, must be set aside and we hold him guilty under Sec. 326 read with Sec. 149 of the Indian penal Code. As regards the sentence he did not take such a prominent part as accused Nos. 1 to 3 and carried only a stick. Besides, on the second occasion he was not one of the persons who beat Aminna. e, therefore, think that the sentence of 3 years'

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rigorous imprisonment would meet the ends of justice in this case and we sentence him accordingly .

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Judgment recorded by the High Court in Criminal Appeal No. 438 of 1945. (By Govt.).

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The Government Pleader for the Governmnet of the Province of Bombay.

Messrs. R.A.Jahagirdar and K.N.Dharap for the accused.

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Corum : Sen and Gajendragadkar, JJ.

5th September 1946.

Oral Judgment (Per Gajendragadkar, J):-

Waman Moreshwar Kale, the Income-tax Officer for the Sholapur District was charged with having committed an offence punishavle under Rs.81(4) of the Defence of India Rules in that contrary to an order issued by the District Magistrate of Sholapur on the 16th December 1943 he had imported certain rationed articles without the permission of the District Magistrate on the 28th January 1944. The learned Sub-Divisional Magistrate, First Class, Bijapur City, before whom the case was tried hold that the order which was alleged to have been contravened had not been properly published and that non-compliance with it did not therefore, amount to an offence. Accordingly, the learned Magistrate acquitted the accused of the offence charged, it is against this order of acquittal that the present appeal has been preferred by the Government of the Province of Bombay.

The material facts leading to the prosecution can be thus briefly stated. On the 1st November 1943 Food Control branch was started at Sholapur. Yassin Ansar, Police Inspector, was appointed Food Control Inspector in charge of this branch. The Bombay Rationing Order was made applicable to Sholapur City on the 29th November 1943. The Sholapur rationed area consisted of Sholapur Municipal Borough, villages of Bala and Shelgi, habitation

within the Sholapur Revenue village and Umedpur settlement. The rationing actually started in the said area on the 15th December 1943, as regards the articles mentioned in the Government order issued in that behalf. On the 16th Decmbe 1943 the District Magistrate of Sholapur issued an order placing a ban on the export and import of rationed articles in regard to the aforesaid rationed area. The prosecution case is that on the 28th January 1944 the accused Mr. Kale who was an Income-Tax Officer for the Sholapur District imported into the said rationed area rice measuring 39½ seers and sugar by weight one seer of eighty toals without the permission of the District Magistrate and thus committe an offence punishable under R. 81(4) of the Defence of Ind[illegible] Rules.

On the 17th January 1944 Mr. Kale had gone with his staff to Barsi on duty. The Food Inspector Mr. Yasin received information on the 27th January 1944 that Mr. Kale and his party were due to return to Sholapur the next day i the morning and that it was suspected that they would import rationed articles contrary to the order of the District Magistrate. Accordingly on the 28th January 1944 at about 8 a.m. the said Food Inspector went with his staff at Degaon Vesh Choutra Naka. It is a Municipal Octor Naka at the entrance of the Sholapur City Municipal Limit. Thereafter the special motor bus by which the accused and his staff were returning from Barsi to Sholapur arrived at the Octroi Naka at about 8-30 a.m. After some time when the said bus was about to leave the Naka the Food Inspector asked the driver to stop the bus and enquired as to whether any of the passengers in the bus were importing into Sholapur any of the rationed articles. This enquiry led to the discovery that four of the passangers were importing some rationed articles. The Food Inspector therefore proceeded to attach the said rationed articles and made a panchnama about the same. After the panchanama was made the passangers were allowed to continue their

journey to Sholapur in the same bus. [illegible]

Subsequently the Food Inspector made further investigatic as a result of which a report was made against the accused [illegible] by him. Eventually the prosecution of the accused for this offence was sanctioned and he was suspended on the 14th April 1944. On the same day the accused was arrested and a charge sheet sent against him in the Court of the City Magistrate at Sholapur. On an application made by the Accoued to this Court his case [illegible] was transferred to Bijapur; that is how it was tried by the Sub-Divisional Magistrate at Bijapur.

The case for the prosecution is that the order passed by the District Magistrate on the 16th December 1943 was duly published as directed by the District Magistrate under R.119. They alleged that contrary to the provisions of the said order the accused has imported certain rationed articles and [illegible] had thus committed the offence charged against him. In support of their case the prosecution have relied upon the evidence of the Food Inspector Yassin and of a panch - Vithalsing. They also relied upon a Naka Receipt alleged to have been issued by the Naka clerk to the accused in reference to the articles which he had imported on that date. This Naka Receipt was proved by the clerk at the Octroi Office. The prosecution also relied upon the evidence of certain clerks and peons in the Income-tax Office with a view to prove their case that the rationed articles produced before the Court were being imported into Sholapur by the accused.

On behalf of the accused it was contended that the order passed by the District Magistrate on the 16th December 1943 was ultra vires and that the requirements of Rs. 119 had not been complied with. It was urged that the accused did not know of the said order and that in the circumstances of this case a contravention of the said order does not amount to an offence. The accused

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denied that he had produced any articles and suggested that the panchnama was inaccurate and false. As regards the Naka Receipt the accused pleaded that it was a forged document, deliberately brought into existence by his enemies.

The learned Magistrate held that the prosecution had proved that the order in question had been contravened by the accused. He was disposed to think that some of the prosecution evidence about the Naka Receipt was false but that the said receipt did tend to corroborate the main charge against the accused. He further held that the order passed by the District Magistrate was not ultra vires According to the learned Magistrate, however, the requirements of Rs. 119 had not been complied with as the District Magistrate issuing this order had neither decided properly how the said order should be published, nor had he taken steps to publish it adequately. On this view the learned Magistrate came to the conclusion that the contravention of the order, though proved, does not amount to an offence.

In this appeal against acquittal the learned Assistant Government Pleader challenged the finding of the learned Magistrate that the requirements of R. 119 had not been complied with. The order in question reads as follows:-

No. R.O.304 of 1943.

Sholapur, 16th December 1943.

Order.

In modification of this office Order No. R.O.21 of 19th October 1943, the District Magistrate, Sholapur, hereby orders, under Rule 81 (2) of the Defence of India Rules,

Jowar including jowar flour,
Bajri including Bajri flour,
Rice including rice floure and paddy,
Wheat including wheat flour, (Suji,rava maida, atta),
Sugar.

that with effect from the date of this order, the marginally noted food stuffs and sugar shall not, without a permit, obtained beforehand from the District Magistrate,

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Sholapur, or any other officer authorised by him in this behalf, be imported or exported to any place out of the rationed area, comprising Sholapur City Municipality - Borough area, the village of Bale and Shelgi, the Wastis within the Revenue limits of Sholapur village, and the Umedpur Settlement, except quantities carried by genuine consumers for personal consumption provided that such - quantities are not in excess of a week's supply viz.3½ - seers of cereals by measure, ¼ seer of sugar by weight - per head.

Infringement of the Order will make persons liable to prosecution under the Defence of India Rules.

(Signed) J. M. Corin,
District Magistrate, Sholapur.

A copy of this order was forwarded with compliments to the Manager, Government Central Press, Bombay for publication in the Bombay Government Gazette, and to the Editor, Sholapur Samachar and Kalpataru, for publication as an item of news. In fact the said order was published in the Bombay Government Gazette on 23rd December 1943 & was similarly published in the two papers in Marathi in the form of news. The said papers, however, did not reproduce a verbatim translation of the order, but gave its substance in some detail It may be stated at the outset that the substance thus given by the Marathi papers does not omit any material particular from the order and the learned Magistrate is clearly wrong in assuming that the said summary "differs on material points from the District Magistrate's order". It has been contended on behalf of the Government that it is obvious that the District Magistrate in promulgating this order had decided how it should be published and had accordingly sent it for publication. As has been already mentioned the order was actually published as desired by the District Magistrate. R. 119 requires that the authority issuing the order has to decide how best the order should be published, and if the order is so publish a presumption arises that persons affected by the order

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shall be deemed to know about that order. Once it is shown that the District Magistrate considered the question as to how any given order issued by him should be published and that the said order has accordingly been published, it would in ordinary cases not be open to the Court to decide whether the method adopted by the District Magistrate was appropriate or not. In Emperor v. Bhatarji Bahu Patil, 47 Bom.L.R.143, where this question arose for decision before a Division Bench of this Court it was held that it is no doubt true that the District Magistrate is empowered to decide the best manner of publishing the notice. In that particular case, however, it was found that whereas the District Magistrate had directed that the order should be published by a beat of drum there was no evidence whatever that the whole of the said order had been duly published in that manner. It was pointed out by Divatia, J., that in such cases the best course would be that the summary of the notification should be published by beat of drum in every village and a translation of the notification in the language of the District should be put up in the Chavdi of the village. The decision in that case, however, proceeded on the finding that the order had not been published in fact as decided by the District Magistrate. Similarly in Emperor v. Gulli, 47 Bom.L.R. 431, it was held that inthe case of an order of general nature of affecting a class of persons it is for the person issuing the order to decide the best way for informing persons whom the order concerns. In the absence of such decision or direction on the part of the issuing authority mere publication of the order in the local official gazette in not enough to fix its knowledge in the persons concerned in the absence of direct evidence on that point. It was observed that it is for the prosecution to prove that the issuing authority had considered the matter and had decided how the particular order should be published. It would also be necessary for them to prove that the order had accordingly

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published as directed by the issuing authority. To the same effect is the decision of the Patna High Court in Madhdeo Prasad v. Emperor, A.J.R.1946 Patna 1. It would thus appear that theprosecution can either prove the fact that the accused knew about the order in question by leading direct evidence in that behalf; they may also prove that the authority issuing the order in question had decided how best it should be published, and that the order had accordingly been so published. In this matter case on proff of the said two material facts the Court will be bound to hold that the persons affected by the order should be deemed to know about it. It has been contended on behalf of Government that the learned Magistrate was wrong in holding that the publication of the order as directed by the District Magistrate in the case was inadequate.

On behalf of the accused Mr. Jahagirdar has contended that the learned District Magistrate in this case did not apply his mind to the requirements of R.119 at all. He argued that the District Magistrate had directed that the order issued by him should take effect from the date of the order itself and not from the date when it would be published and he contended that the fact that the order was sent to the Government Central Press for publication in the Gazette and to the editors of the two papers in Sholapur cannot properly be regarded as steps taken by him in pursuance of the requirements of R.119. The aforesaid publication was in this case merely incidental. In this connection he relied upon the fact that no payment was made to the editors of the papers for the publication of the summary of the said oders. We are unable to accept this contention. Mr. Jahagirdar has contended that the summary published by the Marathi papers faithfully represents the material part of the order. It is ture that the learned District Magistrate did not realise that under the provisions of R.119 his order could not take

effect until it was published; for it is obvious that unless the knowledge of the order can be either proved or legally imputed to any person they cannot be successfully charged under R.81 (4) for having contravened that order. From the order and the endorsements below it it appears to us that the learned District Magistrate was conscious of the fact that the order had to be published, and having considered the nature of the order he decided how it should be published. It is true that he failed to realise the importance of the publication of this order in so far as he assumed that it could take effect even without such publication. But the fact that he committed an error in making the said assumption does not, in our opinion, justify the inference that he did not consider the question of the publication of the order and decide it. In our opinion it is clear that he did consider that question and did come to the conclusion that the proper method of publishing this order would be get it published in the Bombay Government Gazette and in two local Marathi Papers. It is ture that the circulation of the two Marathi papers is not very large. But the Magistrate's decision as to the method of publication could not, we think, ordinarily be challenged in such cases. Apart from that, however, we are not satisfied that in the circumstances of this case the mode adopted by the District Magistrate in publishing this order was unsatisfactory or inadequate.

Mr.Jahagirdar has further contended that this order is ultra vires. It appears that the local Government had decided that rationing should be introduced in the city of Sholapur as from the 2nd February 1944. The District Magistrate,however purported to introduce rationing in Sholapur from the 18th December 1943. Mr. Jahagirdar contends that the order by which the learned District Magistrate purported to introduce rationing in Sholapur before the date fixed by the local Government in that behalf was ultra vires and he argued that since the present order is in effect a part of the rationing scheme

introduced by the District Magistrate in Sholapur on the 15 December this order itself is invalid and ultra vires. In this case we do not think it is necessary for us to consider whether the introduction of rationing in Sholapur by the District Magistrate on the 15th December was legal and valid or not. Assuming, however, that the said order was invalid we are not at all satisfied that the present order prohibiting export and import of certain rationed articles can for that reason be regarded as invalid. In terms the present order has been passed under R.81(2) of the Defence of India Rules. Mr. Jahagirdar has contended that under the said rule such an order can be made by the District Magistrate. His contention, however, is that though the order purports to be under R.81(2), it is in effect under the Bombay Rationing Order, 1943. In this connection he has relied upon the fact that the articles of which export and import has been prohibited beyond a certain measure are identical with the articles included under the Rationing Order. He has also referred to the fact that the measure adopted for fixing the amount of permissible import or export bears a similar correspondence to the quantities fixed under the said Rationing Order. It may be conceded that this order was issued by the District Magistrate with a view to make the rationing already introduced by him successful and in that sense this order may be regarded as connected with the said rationing scheme; but we are unable to hold that such connection would make this order itself invalid. Besides, it appears that a similar order had been issued by the District Magistrate on the 19th October 1943, and in fact this order purports to be in a modification of the said earlier order. Movements of essential food grains was sought to be controlled in many districts at this time by the District Magistrate with a view to stabilise the food situation within their respective areas. That being the position, the present order which has been issued under R.81(2) cannot, we think, be regarded as invalid or ultra vires. We, therefore, hold that the District Magis-

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Magistrate had authority to issue the order and that he decided under R.119 how it should be published. It is unnecessary to repear that in pursuance of his directions the order was accordingly published. That being so, we think the learned Magistrate was wrong in holding that the contravention of this order if proved, would not constitute an offence.

In this veiw of the matter we do not think it necessary to consider the further contention urged on behalf of the Government against the accused. It was argued before us that the order was actually published in the local Government Gazette and since a copy of the said Gazette is sent to the Income-tax Officer at Sholapur the Court may reasonably infer that he read the saidGazette and thus knew about the order. In reply to this contention the accused sought to prove that on the 24th December when the Gazette in question was received at Sholapur he was at Pandharpur on official duty and that thereafter he was on leave until he rejoined on the 3rd January 1944. It is not satisfactorily shown that he was on leave after he returned from Pandharpur. There is some evidence to suggest that he had initialled the receipt of this Gazette on the 24th December. However, even if he did not see the Gazette on the 24th December there is no doubt that he had the Gazette with him on the 3rd January when over his signature it was forwarded to the Income-tax Officer at Ahmednagar, for his persual. Under such cricumstances it may not be unreasonable to assume that the accused may have known about this order. But as I have said above this point is more or less academic in view of our conclusion that the order was duly published and as a result the accused must be deemed to have known about it.

We must, therefore, proceed to examine whether the prosecution have proved that the accused contravened this order as alleged by them. The main evidence on which they rely is the evidence of the Food Inspector and the panch. But before I deal with that evidence it may be convenient to refer to another document which has been sought to be against the

accused. This document which has been sought is the Naka receipt alleged to have been passed on the date of the offen It purports to describe the name of the accused as the person to whom the receipt is passed. It gives the particul of the goods which were being imported and their weights. It mentions the rate at which the octroi was levied and at the end one anna three pies are shown a s received under this document. In his evidence the Food Inspector referred to th document as showing that the accused had imported the goods question. Indeed if the document is genuine and was passed i the presence of the accused by the octroi clerk and received by the accused and if the money charged for the import is shown to have been paid by the accused, it would be a very strong piece of evidence against him. The Food Inspector deposed that the special bus which carried the accused and h staff stopped in front of the Naka and that a receipt was passed to him at that time. According to him the accused handed over the said receipt to him immediately thereafter. He swore that he had seen the Naka clerk handing over the receipt to the accused, though he had not seen him writing i out. This witness further alleged that this receipt had bee in his possession from the time the accused give it to him. In the earlier part of his deposition he was not able to say whether he had made a note about this receipt in his Case Diary though ultimately he admitted that there was no reference to this receipt in his Case Diary or the weekly diaries kept by him. The panch witness sought to support this statement of the Food Inspector by saying that the Inspector had shown him a paper at the time when the panchanama was made and had said tha the said paper was a Naka receipt taken by the accused and handed over to the Inspector. The panch further stated that he was told by the Inspector that the accused was going to show th controlled goods as per the said receipt. Subsequently when the Naka clerk was examined to prove this receipt he, however, stated that the receipt was not passed at 8 or 8-30 a.m., but a 12-15 p.m., that day. He swore that the contents of that receip

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were given to him by a police constable and not by the accused. He did not remember who actually paid one anna three pies to him. But on his evidence it could not have been paid by the accused in any case. This clerk was present at the Naka from 9 a.m. to 5 p.m; but he was definite that he had not seen the accused during that time on that day. He described that the procedure adopted by him in giving such receipts Three copies are made of such receipts; one is handed over to the payee, one remains in the book at the Naka and the third is sent to check Naka Karkun. When this witness made these statements in cross-examination the case was adjourned at the instance of the prosecution in order to enable them to apply for permission to cross-examination him on the ground that he had turned hostile. On the next date of hearing, however, they did not press for cross-examination of the witness. On this point the learned Magistrate was disposed to believe the evidence of the Naka Karkun in preference to the evidence of the Food Inspector and the panch. Accordingly he held that the octroi receipt was not in existence at all at about 8-30 a.m., and he remarked that no explanation had been given by the prosecution as regards the gross discrepancy between the statements of the Naka Karkun on one hand and those of the Food Inspector and the panch on the other. According to him the Inspector's version that the receipt was given to him by the accusedwas wholly untrue. In this connection it may also be mentioned that the evidence of the members of the Income-tax office staff who were travelling in the bus along with the accused seems clearly to indicate that no search was made at the Naka by the Naka clerk, no receipt was given nor was any payment made by the accused. That evidence shows that the octroi clerk who was then present just enquired whether there was any article for which octroi was liable to be paid, and he was satisfied with the assurance given by the passengers that the bus was carrying Income-tax office people and there was nothing in the luggage for which octroi was liable to be paid. We, therefore, see no reason to differ from the

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conclusion of the learned Magistrate that the receipt had not been passed at 8-30, a.m., but it was brought into existence under the instructions of some police constable at 12-15 p.m., that day. The evidence of the Naka clerks appear to us to be true and we have no hesitation in accepting it particularly in view of the fact that in material particulars it is corroborated by the evidence of the staff of the Income-tax Office. In that view of the matter it is obvious that the several details set out by the Food Inspector in regard to this receipt are absolutely false. The receipt was not in existence in the morning and the allegations made by the Inspector in that behalf that it was given by the Naka clerk, to the accused and subsequently by the accused to him must, in our opinion, be characterised as deliberate lies. It is surprising that the Food Inspector had the hardhood to swear to these details especially when the receipt which was in his possession clearly showed that it had been written at 12-15 p.n., that day. Since the receipt was not in existence at that time it is impossible, we think, that the Food Inspector could have shown the receipt to the panch. The panch has, in our opinion, deliberately invented that story with a view to corroborate the Food Inspector. I have already mentioned that the learned Magistrate believed the Naka karkun in preference to the Food Inspector and the panch Even so, he proceeded to hold that the said receipt supports the prosecution story since it shows that the accused importe the same quantity of rice and sugar for which he had been prosecuted. We are unable to understand how the learned Magistrate could have recorded this conclusion in view of his earlier finding. If the contents of the receipt had been dictated to the Naka karkun by some Police constable it is impossible to treat this receipt as any evidence against the accused at all. The said constable has not been examined in this case and from the evidence of the Naka karkun we feel no hesitation in holding that the contents of the said receipt

were dictated to the clerk by the said constable with a view to create evidence in support of the prosecution case against the accused. Since we have come to the conclusion that the evidence of the Food Inspector and the panch in regard to this Naka receipt is utterly false, we feel very great hesitation in accepting their evidence in regard to other matters to which they depose. We think it would be very unsafe to rely upon the evidence of such witnesses unless that evidence is corroborated by other independant evidence or is supported by circumstances which leave no room for doubt that the said evidence may be true.

The prosecution purports to prove the fact that the accused imported rice and sugar as alleged by them by relying upon a panchanama which was made at the Naka after the bus was stopped by the Food Inspector. The panchamama purports to give the description of the articles alleged to have been imported by the accused. It describes the said articles as in the possession of the accused. 31¼ seers of rice were found in a gunny bag stiched at its mouth. On both sides of it, on the top of the bag the name of Kale was written. Inside a teak wood box belonging to the accused some cooking utensils and one gunny bag were found. In this bag rice measuring 7¼ seers and one seer of sugar were found. The panchanama also sets out other items of goods similarly found being imported by three other persons who were separately charged for contravening the order. At the end it is said; "The goods of above description were identified by the individuals mentioned above as their own and were individually produced by them". The evidence of the panch shows that the writing of the panchanama may have taken about two hours. The Food Inspector said that one of the panchas had written the panchamama, but the panch who has been examined swears that it was written by a police constable. Of the tow panchas who signed it, only one has been examined, though, in such a case, where the panchamama supplies very important evidence against the accused, it would have been much better if both

the panchas had been examined. As I have said above, the bus was stopped by the Food Inspector at about 8-30- and the passengers were made to get down. It appears in evidence that almost immediately thereafter the accused showed symptom of feverishness and actually suffered from shivers. A servant of the Income-tax Office was therefore sent into the city to fetch a taxi for him. Accordingly a taxi was fetched within half an hour to three quarters of an hour and the accused went to Sholapur in that taxi alone. This is the effect of the evidence of the members of the Income-tax Office staff who were examined by the prosecution in this case. The panch was not aware as to whether the accused had left alone in a taxi much before the panchanama was completed and the police officer was not quite willing to admit that he had so left the place in a taxi. We are, however, satisfied that the evidence of the members of the staff in the Income-tax Office clearly establishes the fact that he had left the Naka in a taxi within 30 or 40 minutes after the bus was stopped. That being so, it is clear that the writing of the panchanama was made in his absence.

The Food Inspector has stated that after the bus was stopped and the luggage was taken down the accused pointed out to him the bag of rice and that when asked the accused pointed out to him the box containing the bag in which sugar and rice were found. This witness also stated that the accused told him that the rice found in the bag was his. It is somewhat doubtful whether a statement of this kind made by the accused to the police officer would be admissible in view of the provisions of S.25 of the Indian Evidence Act. The alleged conduct of the accused in pointing out the bag and the box and saying they were his own could not, we think, be properly treated as having led to the discovery of any fact since it appears on the evidence of another prosecution witness, Ravanshidda, that he had given the said information to the police even before the accused could have made the said statement to the police officer. But even assuming that the

statement alleged to have been made by the accused and the conduct attributed to him by this witness admissible, we are not prepared to take these facts as true solely on the evidence of this witness. The panch Vithalsing whom the prosecution have examined says that the accused took out himself that the teak wood box. In this respect his evidenc is contrary to that of the Food Inspector. He also says that the accused asked the cleaner to bring down from the top of the bus a bag of rice. This again is inconsistent with the rest of the prosecution evidence which shows that the said bag was lying in the body of the bus between the two benches in the rear. The reason why this panch is supposed to have been present near about the Naka at the material time is far from satisfactory. He says that he had gone there to see if his kabda carts were coming. But it is curious that as soon as the panchanama was over he did not deem it necessary to wait for the kabda carts but went to Sholapur straightaway. It has been contended on behalf of the the accused that this witness is under the control of the Food Inspector since two of his sons were already serving in the Police Departm-ent and his third son has since then been recruited in the same department. It has been suggested that the Food Inspector deliberately took this convenient witness as a panch in order to facilitate the making of a false panchanama. This Panch described the size of the teak-wood box as being 15" in length, 11" in breadth and 9" in height. This description is clearly inconsistent with the description by the members of the Income-tax Office such as Ravansiddhan who says that the box was 2 cubits long 2 cubits broad and 1½ in height, or that of Vishnu who says that the box was 2 to 3 feet in length, 1 to 2 feet high and 1½ to 2 feet in breadth. This panch described the dress of the accused and said that he had put on a coat and a hat contra to the evidence of Balkrishna who does not refer either to the coat or the hat. The panch was asked as to the number persons who were travelling by the bus and as to the place

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where the accused was standing at the material time. He was unable to give any satisfactory answers to either of these questions. That being the nature of the evidence of this panch, apart from the fact that he has deliberately told lies about the Naka receipt as already mentioned by me, his evidence as regards the making of the panchanama appears to us to be highly unsatisfactory. It is improbable that the accused could have taken down the box himself or that he could have admitted that it was in his possession particularly when everybody must have realised that the search was being made with a view to discover whether any rationed articles were being illegally imported into Sholapur. In this connection it is necessary to refer to the evidence of Ravansiddha whom the prosecution had examined with a view to show that the kit consisting of the bedding, one cooking box, one small bag of tur-dal and one bag of rice which were found in the bus belonged to the accused. In his examination-in-chief this witness did purport to make that statement and he said that when these articles were loaded in the bus the accused was present. He swore that all the said article belonged to the accused. Under the stress of cross-examination, however, he was compelled to admit that in the statement made by him before the police he had said that when he and the other servants of the Income-tax Office started to lead the bus on the 27th January at about 10 or 11 p.m. at Barsi "there was already in the bus one gunny bag bearing the name Kale, another bag of gram pulse and a kerosene tin in a wood crate." He also admitted that he had mentioned to the police that their camp at Barsi was expected to continue until the 31st January but that it was dissolved on the 27th January because the work was unexpectedly finished earlier. In his examination-in-chief he had made a contrary statement. The evidence of this witness, therefore, does not at all support the prosecution case that the accused was present when the bag of rice was loaded. On the contrary, it seems to suggest that the bag had already been put

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stealthily in the bus by some unknown person. In this connection it may be mentioned that the Food Inspector received information on the 27th January that the accused and his party were expected to return to Sholapur on the 28th and also that they were expected to import rationed articles contrary to the order of the District Magistrate. It has been contended before us by Mr. Jahagirdar that it is not unlikely that the person who conveyed this information to the Food Inspector may himself have been responsible for planting this bag in the bus unknown to the accused. Under the circumstances of this case it appears to us that there is some substance in this contention. In any event there is no evidence whatever that the accused knew that a bag containing rice and bearing his name had been put in the bus. In this connection it may be relevant to point out that the Food Inspector had searched the house of the accused immediately after the panchanama was made and had attached from his house 150 seers of rice, 47 seers of wheat and 4½ seers of sugar. Eventually it was realised that the possession by the accused of these articles was not illegal and accordingly rice to the extent of 89½ seers was returned to him. In view of the fact that the accused had with him such a large quantity of rice it is unlikely that he would attempt to import this bag of rice in the manner suggested by the prosecution.

As I have already pointed out, part of the rice and some sugar is alleged to have been imported by the accused in a bag which was put inside the wooden box belonging to him. It appears in evidence that when the party went to Barsi the cooking arrangement for the accused alone was made separately, while the rest of the staff had arranged for themselves on the basis of a club. The servant of this office named Bhimaji Govind was doing the work of a cook for the accused. It is admitted by the members of the staff who were examined in this case that the cooking box in which these articles were found was in charge of the cook during the period that

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they were staying at Barsi. The box was found to be locked when it was taken out of the bus. Curiously enough the Food Inspector did not remember as to who actually opened the box. The accused has stated in his statement that the key of the box remained with the cook and that he had not opened it at all. No evidence has been produced by the prosecution to show that the key was with the accused and that he had opened the box. The panch did not even remember whether the box was locked when he looked at it, nor whether the lock of the box was opened in his presence. He only said that the accused had opened the lid of the box. In this state of evidence it is impossible to hold that the key was with the accused or that he opened the lock of the box. It seems to us that the statement of the accused that the key of the box continued to be with the cook may be true and that it is the cook who may be responsible for the rice and sugar that were found in the box. It is very unlikely that the accused would take back the key from the cook particularly when the same cook was going to serve him even on his return to Sholapur. It any case it is not even suggested that the key was with him and, as I have said above, both the Food Inspector and the panch have admitted that they did not remember who really opened the box. Under these circumstance it seems to us that it cannot be held that the rice and the sugar which were found in the box were being imported by the accused.

That being the nature of the evidence on which the prosecution rely we are unable to hold that they have proved that the accused has contravened the order of the District Magistrate by importing any rationed articles contrary to the said order. In appreciating the evidence in this case the learned Magistrate has failed to consider the fact that the Food Inspector and the panch are proved to have made false statements in regard to one important matter in the case. He has also not applied his mind to the several discrepancies in their evidence and to the improbability of the story set out

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by them.We think that the conclusion of the learned Magistrate that the accused had imported into Sholapur sugar and rice as alleged by the prosecution is not at all justified by the evidence in this case. That being our view we must hold that the charge levelled against the accused is not proved. Accordingly, the appeal fails and is dismissed.

We wish to add that on the materials placed before us in this case we feel satisfied that in making the several statements about the Naka receipt on oath the Food Inspector was guilty of conduct unworthy of an officer of his standing and status. We do not know if the police constable who managed to get the Naka clerk to write out the said receipt did so directly under the instructions of the Food Inspector . But whatever that may be, we see no justification for the false statements which the Food Inspector made in regard to this receipt. It may always be realised that the investigating officers must act fairly by the accused and by the Court, and if in their zeal to secure convictions they stop to make false statements their conduct calls for several censure. Having regard to the conclusions to which we have arrived in regard to the character of the evidence given by this witness we think it is necessary that a copy of this judgment should be forwarded to the superiors of the Food Inspector for such action as they may deem fit to take against him.

Having regard to the fact that the rice bag which was attached in this case is not claimed by the accused and there being no evidence that it belonged to any other passenger in the bus we think it is necessary to direct that the said rice bag should be forfeited to the Government.

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Judgment recorded by High Court in Criminal Appeal No. 439 of 1945.

The Assistant Government Pleader for the Government of the Province of Bombay.

Messrs. S, R. Madbhavi and K.R,Bengeri for the accused

Corum : Sen and Gajendragadkar, JJ.

5th September 1946.

Oral Judgment (Per Gajendragadkar, J.):

This appeal arises from an order of acquittal passed by the Sub-Divisional Magistrate. First Class, Bijapur, in favour of the accused in Criminal Case No. 56 of 1944. The accused had been charged with having committed a breach of the order issued by the District Magistrate of Sholapur on the 16th December 1943 and thus rendered himself liable fo punishment under r. 81(4) of the Defence of India Rules. The learned Magistrate who heard the case against him held that the order in question had not been properly published and its contravention did not amount to an offence. On the facts he found that the accused had imported the rationed articles as alleged by the prosecution. In view of his findings on the question of law, however, he acquitted the accused. It is against this order of acquittal that the Government of the Province of Bombay have filed the presen appeal.

The material facts giving rise to the prosecution against this accused are the same as those from which Criminal Appeal No. 438 of 1945 had arisen. Since I have set out those facts in detail in my judgment in that appea

I do not propose to set them out over again in this judgment. The learned Magistrate who tried this case had recorded similar conclusions about the validity of the order and about the facts alleged by the prosecution against the accused. I do not propose to deal with the points of law over again in this case. Our conclusions on those points in this case will be just the same as those which we have already recorded in Criminal Appeal No. 438 of 1945. I will, therefore, confine this judgment only to the question of fact, namely, whether the accused has contravened the order as alleged by the prosecution.

The case for the prosecution was that while the accused was returning along with the other members of the Income-Tax Office party from Barsi he was found importing six seers of sugar contained in a gunny cloth bag with a red tape tied round the neck. This bag was found in a trunk which the prosecution alleged belonged to this accused. The accused denied the charge. He urged that the suger before the Court was the unconsumed balance of the Barsi camp which was wound up for days too soon. According to him this sugar would have been taken by the party to Malsiras within the next few days. This sugar remained with the acuused as the club, namely, the members of the touring party, did not own a separate box. The accused admitted the fact that the sugar was found in a trunk which belonged to him. He, however, contended that he was not importing the sugar on his own account, but that he was holding it for the members of the club. The accused was a member of this club. According to the accused he was entrusted with the work of purchasing sugar that may be required by the members of the club. He says that he purchased sugar accordingly and the balance that remained was taken by him in his trunk in order that

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it may serve the purpose of the club after the party went on a tour again to Malsiras. Vishnu Kadam, another clerk in this office, who has been examined in this case has deposed to the fact that the accused was given the work of purchasing sugar for the party. A slip of account, Ex.6-A has been produced in this case to show the purchases that were made for the members of the club during their stay at Barsi. On this slip an entry of 14 annas is made for the purchase of such sugar. Witness Vishnu admitted that the sugar thus purchased would have been consumed in a couple of days and he suggested that the accused may have made subsequent purchases of sugar for the members of the club. According to this witness the accounts of the club had not been completed and settled and that the accused would have given his own account as regards the purchase of this sugar after they reached Sholapur. None else had brought any sugar for the club during this period and the accused had admittedly spent out of his own pocket for the club for purchasing the sugar. Witness Gajanan also admitted that t surplus articles left at Barsi would be used at the nex place of the camp. That appears to be the practice of the members of this office. They have to go on tour from time to time and if at any given place all things purchased fo the club are not consumed, they carry the balance to the next place of tour. Meanwhile these articles are kept at the office and are not used by any members individually, I would thus appear that the main question which arises for decision in this case is whether the story of the accused that the sugar found in his trunk belonged to the club is true, and, if yes, whether that itself would show that he had not committed the offence charged. It is unnecessary therefore to examine the evidence of the prosecution which

shows that the sugar was found in a trunk and a panchanama was made about it. These facts are admitted by the accused. From the evidence of the two witnesses to whom I have just referred it seems to us that the plea made by the accused that the sugar was not his own must be true. The fact that the price for this sugar is not debited in the accounts which are pnoduced in the Court could not necessarily show that this sugar was not purchased by the accused for the members of the club. In fact it was admitted by Vishnu that the accounts were still incomplete and that the sugar which is shown to have been purchased could hardly have sufficed for the members of the club even for a couple of days. We are, therefore, unable to agree with the conclusion of the learned Magistrate that the sugar belonged to the accused and that he was importing it on his own account. Apparently the learned Magistrate felt that the accused should have proved that fact by leading evidence. He failed to consider the admissions made by the witnesses which I have set out above. The learned Magistrate was also impressed with the fact that the surplus jowar belonging to this club had been entrusted to clerk Ramagade and he was inclined to take the view that the surplus sugar would probably have been entrusted to him if it really belonged to the club. We do not think that this circumstance negatives the plea of the accused. On the evidence then we are satisfied that the sugar which was found in the trunk of the accused really belonged to the club. It may also be taken to be established, we think, that this sugar was not intended to be used by the members of the club at Sholapur but that in the ordinary course they would have taken it with them to Malsiras where they were expected to go on

tour within a few days after the 28th January 1944.

That being our view, it is necessary to consider whether in such a case the accused could be deemed to have imported the sugar contrary to the order issued by the District Magistrate. Mr. Madbhavi for the accused has contended that the import which is prohibited under this order must be import of personal use. He has also urged that the import by one of the members on behalf of the whole body of the club cannot properly be regarded as import which is prohibited under this order. It has also been argued that since the ultimate destination of this sugar was Malsiras, where the members of the staff would have gone within a short time, this sugar could not be deemed to have been imported into Sholapur at all. It seems to us, however, that the accused was taking this sugar into Sholapur from out-side without the permission of the District Magistrate technically does amount to a contravention of the order. The denotation of the word 'import' has been recently considered by this Court in Maganlal vs. Ahmedabad Municipality 47 Bom.L.R.100. The decision in Emperor v. Dagadu Shetiba, 39 Bom.L.R.1062, on which Mr. Madbhavi has relied is clearly distinguishable. Similarly the decision in Queen Empress v. Tota Ram 16 all. 276, on which also Mr. Madbhavi has relied cannot, in our opinion, be of much assistance in considering the words of the order in question. Even on the plea made by the accused he is a part-owner of the sugar and we have ascertained that the sugar which he was carrying would be in excess of the permissible quantity even if it is treated as belonging to the members of the club. We, therefore, think that the prosecution have shown that the accused was importing sugar into Sholapur contrary to the order in question. It is quite true that the accused

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probably does not know Marathi and in fact may perhaps not have known about this order. Besides, on the view that we are taking about the denotation of the word 'import' the offence which he is found guilty is in the circumstances of this case purely technical, We are satisfied that he was not carrying the sugar for personal use and that like all other members of the club he was also interested in taking this sugar along with the balance of jowar to Malsiras which was going to be their next place of tour. Mr. Madbhavi has contended that the Ramagade had not been prosecuted though he was found to have been in possession of jowar which belonged to the club. We think that if it had been realised that the sugar which was found with the accused belonged to the club it is very likely no prosecution would similarly have been started against him. Apparently persons in charge of the prosecution did not believe that this sugar belonged to the club and so the accused has been charged in this case. Since we are disposed to think that in carrying sugar into Sholapur the accused has technically contravened the order, we must affirm the finding of the learned Magistrate that he was importing the sugar contrary to the provisions of the order. Since, however, the offence is purely technical we think the ends of justice would be met if the accused is sentenced to pay a fine of Rs. 25/-. or in default to undergo regorous imprisonment for one week. The sugar found in his possession should be forfieted to the Government.

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Judgment recorded by the High Court in Criminal Appeal No. 440 of 1945.

The Assistant Government Pleader for the Government of the Province of Bombay.

Mr. N. S. Anikhindi for the accused (Appointed).

Corum: Sen and Gajendragadkar, JJ.

5th September 1946.

Oral Judgment (Per Gajendragadkar, J.):—

In this case the accused was charged with having committed a breach of the order of the District Magistrate issued on the 16th December 1943 and thus become liable for punishment under R. 81 (4) of the Defence of India Rules. The learned Magistrate who heard the case against the accused held that the order in question had not been properly published and its contravention did not amount to an offence. On the facts he found that the accused had imported the rationed articles as alleged by the prosecution. In view of his finding on the question of law, however, he acquitted the accused. It is against this order of acquittal that the Government of the Province of Bombay have filed the present appeal.

The material facts in this case are the same as those in Criminal Appeal No. 438 of 1945 which we have just decided. I do not propose, therefore, to set out those facts over again. Similarly the point of law which arises in this case in the same as in the earlier appeal. Since I have dealt with that point at length in the said appeal I do not propose to cover the same ground over again in this judgment. This judgment will, therefore, be confined to the main question of fact, namely, whether the prosecution have proved that this accused was guilty of the ~~execution have proved that~~ contravention of the order in question, as alleged by them.

The case against the accused was that he was found importing a bag with khaki coloured cloth which contained Crystal sugar measuring three seers. According to the prosecution the bag in which the sugar was discovered belonged to the accused and he was importing it into Sholapur on the 28th January 1944 contrary to the order of the District Magistrate. In support of their case the prosecution relied upon the evidence of Food Inspector Yassin who said that when the bus was stopped by him he enquired with the passengers about the rationed articles and that the accused offered to produce a bag containing sugar. A panchanama was made in which this sugar was referred to as being in the possession of the accused. The panch who proved the panchanama said that the sugar now before the Court was produced by the accused. In cross-examination he said that the accused was standing near the bus and that he brought the sugar bag from the bus. He did not remember from what particular place in the bus the bag was taken out. On the bag there was no name or any special mark to indicate that it belonged to the accused. He was asked whether this accused had gone into the city to fetch a taxi for the Income-tax Officer, Mr. Kale, and he said that it was not true that he had gone into the city for that purpose. The accused denied that he had pointed out any bag as his own and pleaded that immediately after the bus was stopped he had gone into the city to fetch a taxi for the Income-tax Officer, and that he returned after nearly an hour with a taxi. The witness Vinhnu said that he did not know what articles were found with the accused and admitted that the accused had gone to the city to fetch a taxi and that by the time he returned with the taxi the rationed articles had been taken to the Municipal Naka by the police and the panchanama was being written. To the same effect is the evidence of Shamu, another prosecution witness. He said that the accused had not produced in his presence a khaki bag containing sugar, and he admitted that the accused had gone into the city to fetch a taxi for the Income-tax Officer.

Karanchidhama

Revanshiddappa, also examined by the prosecution, admitted tha the accused had no articles with him at all. He also said that after the accused went into the town to fetch a taxi all the articles in the bus were taken out and thereafter the police searched and seized the contraband articles. He also said tha the acuused's belonging was only a hand-bag containing a few things, but that sugar was not in his hand-bag. "Somebody must have told the police officer the name of the accused in his absence" said this witness. In this state of evidance we are unable to hold that it is proved that the accused produced the bag in which the sugar was found. We think that the evidnece, on the contrary, shows that the articles were taken out of the bus after the accused had already left for the city in order to fetch a taxi for the Income-tax Officer. The statement of the Panch that the accused had not gone into the city is clearly unture. It may be that he had not noticed this accused at all on the scene or, having seen him, he deliberately refuses to admit that he had gone into the city. In either case we are not prepared to attach any value to the evidnece of the panch or that of the Food Inspector in view of the fact that all the other witnesses whom the prosecution have examined clearly depose to the fact that the accused was absent at the material time. It seems to us highly impossible that the accused would have shown this bag even if it was his. If the accused was not present on the scene at the time when the goods were taken out of the bus -- and that indeed is the effect of the evidence of the Income-tax Office witnesses to whom I have referred --- it would be unsafe, we think, to hold merely on the evidance of the panch that he pointed out the bag and produced it as his own. In any event, we think that there is a room for reasonable doubt as to whether the bag had in fact been produced by the accused as alleged by the prosecution. That being so we think we must give the accused the benefit of doubt and hold that the case against him has not been satisfactorily proved. The learned Magistrate has failed to appreciate the effect of the statements made by

the Income-tax office witnesses. He had assumed that the panchamama must have been made in the presence of all the inmates of the bus including the accused. That assumption, we think, is clearly inconsistent with the evidence of the said witnesses whom we see no reason to disbelieve. We, therefore, hold that the prosecution case against the accused has not been proved beyond a reasonable doubt. Accordingly, we think the order of acquittal passed in his favour must be affirmed and the appeal must be dismissed.

Having regard to the fact that the bag of sugar which was attached in this case is not claimed by the accused and therebeing no evidence that it belonged to any other passenger in the bus we think it is necessary to direct that the said bag should be forfeited to the Government.

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Judgemnh r.:corded by the High Court in Criminal Appeal No. 441 of 1945.

The Assistant Government Pleader for the Government of the Province of Bombay.

Mr. K. G. Datar for the accused (Appointed).

Coram: Sen and Gajendragadkar, JJ.

5th September 1946.

Oral Judgment (Per Gajendragadkar, J):-

In this case the accused was charged with having committed a breach of the order of the District Magistrate issued on the 16th December 1943 and thus become liable for punishment under R. 81(4) of the Defence of India Rules. The learned Magistrate who heard the case against the accused held that the order in question had not been properly published and its contravention did not amount to an offence. On the facts ~~thxx~~ he found that the accused had imported the rationed article as alleged by the prosecution. In view of the finding on the question of law, however, he acquitted the accused. It is against this order of acquittal that the Government of the Province of Bombay have filed the present appeal.

The material facts in this case are the same as those in Criminal Appeal No. 438 of 1945 which we have just decided. I do not propose, therefore, to set out those facts over again, Similarly the point of law which arises in this case is the same as in the earlier ~~x~~ appeal. Since I have dealt with the point at ~~thx~~ length in the said appeal I do not propose to cover the same ground over again in this judgment. This judgment will, therefore, be confined to the main question of facts, viz., whether the prosecution have proved that this/~~appeal~~ accused was guilty of the contravention of the order in question as alleged by them.

The case of the prosecution against the accused in this case was that he had imported into the city of Sholapur 7 seers of rice without the permission of the District Magistrate and thus contravened the order issued by him on the 16 December 1943 making himself liable, as a result, for punishment under r. 81(4) of the Defence of India Rules. In support of their case the prosecution relied upon the evidence of the Food Inspector and the panch who proved the panchanama. The accused denied that he was guilty of the offence charged. He has filed a written statement in which he has alleged that the rice which was found in the bedding did not belong to him but that it belonged to the Income-tax Officer, Mr. Kale. He says that he was a servant in the Income-tax department and was also working as a cook for Mr. Kale. He further stated in his written statement that the rice which was found in the bedding had been put there under the instructions of Mr. Kale, and that he was not concerned with it at all. In fact according to this accused, even the bedding in which the rice was found did not belong to him, but to Mr. Kale. It would thus appear that the accused virtually admitted the fact that the rice was found in the bedding and that the bedding was being used by him. That being so, it may not be unreasonable to hold those facts proved on the evidance of the Food Inspector and the panch. The only question which then remains to be considered is whether it was the accused who was importing this rice or whether the rice had been put into the bedding by the accused under the instructions of the Income-tax Officer and was being imported into Sholapur.

Some of the witnesses of the Income-tax department have admitted that as soon as the bag was produced from his bedd the accused said that the rice produced from his bedding belonged to Mr. Kale, the Income-tax Officer. That is the

evidence of Vishnu, Shamu as well as Ravanshiddappa. Shamu in particular stated that the bedding belonged to the accuse but the rice contained therein belonged to the Income-tax Officer. It is thus true that as soon as the rice was discovered in his bag the accused made a statement that it belonged to the Income-tax Officer, and to that extent it mu be held that the statement made in the panchanama is inaccu-rate. But we are not satisfied that the statement made by the accused is ture. It is obvious that the beddding belonge to the accused, at any rate it had been given to the accuse by the Income-tax Officer for his use. If the Income-tax Officer wanted to import any rice into the city it is, we think, extremely unlikely that he would inform his cood abou it or that he would instruct his cook to put it in his own bedding. The allegations made in his written statement by t accused rather suggest that the accused bears some grudge against the Income-tax Officer. Prima facie the rice which was found in the bedding which belonged to the accused and w which was in his exclusive possession must be held to be impo imported by him. On the evidence as it stands we are unable to hold that the accused may have put the rice inside the bedding under the instructions of the Income-tax Officer. We therefore, think that the learned Magistrate was right in hol ing that the accused had imported the rationed article into Sholapur as alleged by the prosecution.

Mr. Datar for the accused has contended that his client was probably ignorant of the order since he is not shown to know Marathi. Having regard to the circumstances in this cas we think the ends of justice would be met if the accused is directed to pay a fine of Rs,25 or in default to undergo rigorous imprisonment for one week. The rice found in his

possession should be forfeited to the Government.

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Criminal Appeals. 105-209

In the High Court, Bombay --- against acquittal (Bijapur).

GOVERNMENT OF BOMBAY.
Legal Department.
Resolution No. 7780
Bombay Castle, 4th November 1946.

Read Government Resolution, Legal Department, No. 7068, dated the 26th September 1945.

Letter from the Government Pleader, High Court, Bombay, No. 2898, dated the 10th September 1946, stating that Criminal Appeal No. 439 of 1945 filed by Government against the acquittal of the accused in criminal case No. 56 of 1944, was heard by the High Court Bombay, on 5th September 1946 when the following order was passed:-

In the Court of Sub-Divisional Magistrate, First Class, Bijapur City. Criminal Case No. 55 of 1944. Emperor vs. Waman Moreshwar Kale ... Accused. --- Criminal Case No. 56 of 1944. Emperor vs. Rameshchandra Narayan Baliga .. Accused. --- Criminal Case No. 57 of 1944. Emperor vs. Kashinath Tatya Kale .... Accused. --- Criminal Case No. 58 of 1944. Emperor vs. Bhimaji Govind Kulkarni .... Accused. --- (Offence under Rule 81(4) of the Defence of India Rules read with District Magistrate, Sholapur's Order No.R.O.304, dated 16-12-1943).	The Court allows the appeal, sets aside the order of acquittal passed by the Sub-Divisional Magistrate, F.C. Bijapur City, convicts the accused for breach of District Magistrate, Sholapur's Order R.O.No.304, dated 16-12-1943, punishable under Rule 81(4) of the Defence of India Rules and

sentences him to pay a fine of Rs. 25/- or in default one week's R.I.

Letter from the Government Pleader, High Court, Bombay, No. 3014, dated the 19th September 1946, stating that Criminal Appeal No. 441 of 1945 filed by Government against the acquittal of the accused in Criminal Case No. 58 of 1944, was heard by the High Court, Bombay, on 5th September 1946, when the following order was passed:-

The Court allows the appeal, sets aside the order of acquittal passed by the Sub-Divisional Magistrate, F.C., Bijapur City, convicts the accused for breach of District Magistrate Sholapur's

order No. R.O. 304 dated 16-12-43 punishable under Rule 81(4) D.I.Rules and sentences him to pay a fine of Rs.25, or in default to undergo R.I. for one week.

Letter from the Government Pleader, High Court, Bombay, No. 3016, dated the 19th September 1946, stating that Criminal Appeal No. 438 of 1945 filed by Government against the acquitt of the accused in Criminal Case No. 55 of 1944, was heard by the High Court, Bombay, on 5th September 1946, when the following Order was passed:-

The Court confirms the order of acquittal passed by the Sub-Divisional Magistrate, First Class, Bijapur, City, and dismisses the appeal.

The rice bag attached to be forfeited to the Government.

Letter from the Government Pleader, High Court, Bombay, No. 3018, dated the 19th September 1946, stating that Criminal Appeal No. 440 of 1945 filed by Government against the acquittal of the accused in Criminal Case No. 57 of 1944, was heard by the High Court, Bombay, on 5th September 1946, when the following order was passed:-

The Court confirms the order of acquittal passed by the Sub-Divisional Magistrate, First Class, Bijapur City, and dismisses the appeal. The sugar attached to be forfeited.

Letter from the Government Pleader, High Court, Bombay, No. 3129, dated the 2nd October 1946, forwarding uncertified copies of the High Court Judgments.

RESOLUTION.- The result of the appeals should be recorded.

By order of the Governor of Bombay,

A.R.KHAN,

Original

Deputy Secretary to Government.

To

The Home Department,
The Commissioner, Southern Division,
The District Magistrate, Bijapur,
The District Magistrate, Sholapur.

Submitted for Signature.

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order No. R.O. 304 dated 16-12-43 punishable under Rule 81(4) D.I.Rules and sentences him to pay a fine of Rs.25, or in default to undergo R.I. for one week.

Letter from the Government Pleader, High Court, Bombay, No. 3016, dated the 19th September 1946, stating that Criminal Appeal No. 438 of 1945 filed by Government against the acquittal of the accused in Criminal Case No. 55 of 1944, was heard by the High Court, Bombay, on 5th September 1946, when the following Order was passed:-

The Court confirms the order of acquittal passed by the Sub-Divisional Magistrate, First Class, Bijapur, City, and dismisses the appeal.

The rice bag attached to be forfeited to the Government.

Letter from the Government Pleader, High Court, Bombay, No. 3018, dated the 19th September 1946, stating that Criminal Appeal No. 440 of 1945 filed by Government against the acquittal of the accused in Criminal Case No. 57 of 1944, was heard by the High Court, Bombay, on 5th September 1946, when the following order was passed:-

The Court confirms the order of acquittal passed by the Sub-Divisional Magistrate, First Class, Bijapur City, and dismisses the appeal. The sugar attached to be forfeited.

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RESOLUTION.- The result of the appeals should be recorded.

By order of the Governor of Bombay,

A.R.KHAN,

Original

Deputy Secretary to Government.

To

The Home Department,
The Commissioner, Southern Division,
The District Magistrate, Bijapur,
The District Magistrate, Sholapur.

Submitted for signature

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Cri. Case NO. 3/46 of the Court of the Additional Stipendary Magistrate, F.C. Bijapur and Crime NO. 5/46 of Kolhar Police Station.

Imperator

Vs.

1. Siddappa Shivapa Sultanpur.
2. Ramappa Dundappa Kolkar
3. Sadashiv Kedari
4. Pandu Mahadu Pavar.

The facts of the case are :-

In this case 4 accused are charged with having committed grievous hurt to Dyavappa Ex. 1 and simple hurt to Kallappa Ex. 2 on 16-1-1946 at night with an axe and sticks, when they were sleeping in the field called Guggari Hola in the village of Ronihal in Bagewadi Taluka. Accused NO. 1 had an axe, accused NO. 2 had a ringed stick and accused NOs. 3 and 4 had ordinary sticks. The assault took place at 12 or 1 A.M. and it was a moon-light night. There was a scuffle between the accused and Devappa and Kallappa injured persons and in the scuffle, one Chappal was left behind by accused NO. 2 in the hurry to run away, when Ex. 11 Sangappa and Ex. 13 Mallappa appeared on the scene , hearing the row from neighbouring fields. Ex. 9 Devendra , who was sleeping in a neighbouring field, hearing the row and seeing the injured persons being laboured by some four persons, ran to the village and informed the mother-in-law of Devapa. She raised an alarm in the village and consequently Ex. 12 Mallappa and others came to the field and took away the injured persons. The injured persons gave the names of their assailants to these persons . So from the facts narrated in brief above, it is [illegible]ar that there is a voluminous evidence to prove the guilt of the [illegible]ed. Under these circumstances the accused were charged under [illegible]s 323,325,447 read with Section 34 I.P. Code.

[illegible]t the accused, having no defence to make, hit upon a

plan that they have been involved in the case, because of their ill-feeling with Ex. 14 Mallappa Bil[illegible]i who being an influential man in the village, has brought about false evidence against them. But there is absolutely nothing except their suggestion not borne out by an iota of evidence which goes to sh that this Mallappa Ex. 14 had any grudge against the accused. The learned Magistrate admits in para 11 that all these suggesti being denied, there remained mere suggestions. Having said this, he ought to have completely discarded the suggestions, but by reading the judgment, it will be clear, that these suggestions have weighed upon the mind of the learned Magistrate and he has read the prosecution evidence , being prejudiced by their -- suggestions. This has led to the misappreciation of evidence , causing failure of justice in the case. Hence it is necessary that an appeal be filed and the probable grounds of appeal are as under:-

1. That the learned Magistrate has erred in holding that the injured persons Exhs 1 and 2 were not in complete possession of mental powers and that they did not observe who their assailants were. It is impossible to believe the suggestion of the learned Magistrate in view of the fact that these injured persons carrying on the scuffle with the accused persons for some time and Kallappa Ex. 2 actually felled one of the accused to the ground and they were lying one upon another.

2. The learned Magistrate has referred to the contradiction of Ex. 1 Devapa and of Ex. 2 Kallapa with the Police Tippan, proved by Ex. 18, who says that they stated to him that they did not see who the assailants were as they felt giddy. Both have denied the fact in their deposition in court and have stated that they did not state so to the police. This seems to be correct. The police tippans are obviously not correct and cannot be relied upon to disbelieve the witnesses in view of the circumstances stated supra.

3. In view of the assault by the 4 accused from all sides, it is

it is just possible that Devappa may have not marked as to whether there were 4 hits by the axe or 2 hits, as Exhs 1 and 2 say that they were belaboured indiscri-minately by the 4 accused before they ran away. Hence the discrepancy between the doctor's certificate and the statement of Exh. 1 is not inexplicable. It cannot be construed in the way the learned Magistrate has done.

The learned Magistrate ought to have believed Exhs 11 and 13, the two other eye witnesses and his remarks for not believing them are mere conjectures, not borne out by any evidence in the case.

In this connection, it may be noted that the learned Magistrate has erred in saying that there were other night watches in the neighbouring fields and none of them came there - which fact is not borne out by the evidence in the case. On the other hand, there is evi-dence to show that the crops in the fields surrounding the ~~Heggar~~ Guggari land, were not ripe for watch and there were no watchmen ~~hired~~ hired by.

That the learned Magistrate has greatly erred in con-cluding that a false case concocted against the accused at the instigation of Ex. 14 without any foundation for it.

That the learned Magistrate has erred in disbelieving Ex. 12 for the alleged connection with Mallappa Bilgi Ex. 14 and also other witnesses by connecting them in a far fetched manner with Ex. 14.

That the learned Magistrate has lost sight of the fact that it is not alleged that the police patel Ex. 4 is friend of Mallappa Bilgi Ex. 14 and that there is any ill-feeling between the police Patil and the accused, and if so, there is no reason why the police Patil

should take action against the accused.

9. That the learned Magistrate has not given due importance to the finding of the Chappal , belonging to accused NO. 2.

10. It is admitted that Mallappa Bilgi Ex. 14 is a friend of the whole village and if so, there is nothing unusual that he took some interest in the case, as a brother villager of the injured persons.

11. ~~xkthoxxghxxthexxburxdexxixsxoxxxthexxprxxsxcutionxxxxx~~ That the learned Magistrate ought not to have given importance to the minor discrepancies which are likely to occur, when evidence is led after some time after the offence.

12. Although the burden is on the prosecution yet it deserves to note that the defence could not get any evidence to prove their suggestion , except a worthless Witness Ex.19 to narrate a cock and bull story , which is, as the Magis-trate says, is palpably absurd.

13. That the learned Magistrate has appraoched the case with a prejudiced mind and so has taken an erroneous view of the evidence.

14. That for the reasons stated above the learned Magis-trate ought to have held that it was not case fit for giving benefit of doubt, in view of reliable evi-dence and circumstances against the accused and ought to have convicted the accused.

D.S.P, Bijapur 14/9

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Applied for on: 28th (twenty-eighth) October 1946.

S.No.2179/1946-. Ready for delivery on: 31st (thirty first) October 1946.

Words: 1280-
Copying fee Rs 2-10-0
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Surcharge 0-13-0
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Paper charges 0- 1-0
Total Rs. 4-10-0

Delivered over on:

Record Keeper.

In the Court of the Sessions Judge,

At Bijapur. Exh. 39.

Sessions Case No. 29 of 1946.

Crown

Vs.

1. Basappa Gangappa Jigalur.
2. Gursangappa Basappa Jigalur.

both of Hallur. --- --- Accused.

Present: R. W. H. Davies, Sessions Judge, Bijapur.

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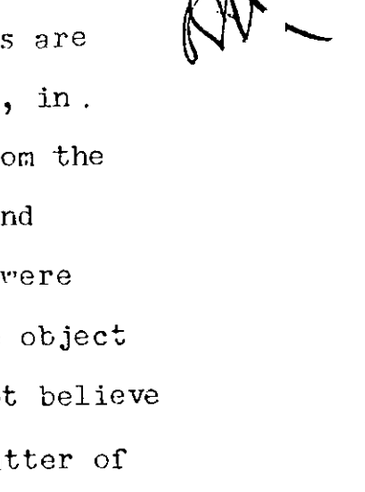
Judgment.

In this sessions case the two accused are placed before the Court charged, firstly, with murder and, secondly, with misappropriating four rings from the body of the deceased.

2. The facts are that a certain Mallangouda, the deceased in the case, was violently done to death in the village street of Hallur on 5th of February 1946. The accused admitted causing the death of the deceased and after the incident went to the village chavdi to report the matter. They made an application to the Police Patil which under the law could not be produced by him. The Police Patil sent in a report of their statements. This also could not be produced. The prosecution case is that the deceased and a certain Basappa set out for their fields in the early morning of the 5th of February. They were unarmed. When they got half way down the village, the deceased was asked to sit down and

smoke by one of the villagers and Basappa went on ahead. Presently he heard a dry and turning round he saw the two accused murdering the deceased with axes. This case is supported by a large number of witnesses all of whom are, in my opinion, lying in various degrees and manners. I agree with the assessors that the accuseds' version is the true one. I further agree with them that the accused mildly exceeded their right of private defence and both of them are guilty of culpable homicide not amounting to murder. The assessors have also unanimously refused to convict the accused under the second charge and I agree with them that the charge is not supported by the true facts of the case. The position seems to be as fol ows: If the prosecution case that the accused were armed and the deceased unarmed, and that the accused deliberately murdered the deceased cannot be accepted, then in default of any other version the benefit of the doubt must be given to the accused and their version must be accepted.. Whether for these reasons or not their versionxx is accepted, in point of fact, in my opinion, the accused are telling the truth. I believe their statement before the Sessions Court and disbelieve the version of the prosecution witnesses.



2. The prosecution witnesses consist of the following persons: Basappa, the companion of the deceased, Chandramappa, Gurupadayya, Tippawa, Virupaxi and Rachappa. There are also the Talikan of the chavdi by name Basappa, the village Kulkarni, Mahadevappa, Rudrawa, the mother of the deceased and finally the Police Patil by name Ramanagouda. The other witnesses are not important. Basappa, the main prosecution witness, is, in my opinion, a most unsatisfactory witness. It appears from the statement of the Police Patil and the Kulkarni that he and the deceased together with other persons in the village were drunkards and bad characters and had formed a gang whose object was to injure poor persons and blackmain others. I do not believe his version of the incident. More particularly in the matter of

the rings, which, in my opinion, is a complete fabrication. As regards Chandramappa, he is a close relation of Basappa, the first witness. In my opinion, he also is not worthy of belief. Gurapadayya is, in my opinion, also not a credible witness. There is an important clash in his evidence and in that of the witness Virupaxi (Ex.10). This latter is plainly lying. It is obvious that there was a quarrel between his family and accused No.1. Tip awa has gone back on her evidence in the committal Court and denies that she knows anything of the offence. As regards Rachappa (Ex.11), I entirely disbelieve his assertion that the accused shouted: 'Din, Din'. It is admitted by all that no one has ever heard Lingayats crying out in this manner before and I myself do not believe it. Basappa the Walikar, in my opinion, is siding with the deceased and his gang. In view of the actual statements of the accused in the chavdi, it is plain that he is a false witness. The Kulkarni (Ex.13) is, I think, a true witness. He supports the accused's version of the assault. He denies any knowledge about the rings. This incident seems to me a later invention further to entangle the accused. I believe it to be entirely false. The Kulkarni also says that Basappa and the deceased were in the habit of carrying axes when they went to their fields. Rudrawa, the deceased's mother, is, in my opinion, lying. But in her case it is not supprising. The statement of Ramanagouda (Ex.23) the Police Patil is very illuminating. I have no doubt that it is true. It supports the version of the accused. Moreover, he states quite clearly that nothing had been said about the theft of the rings until 3 p.m. that day when the Police arrived. This supports my view that the question of the theft of the rings is false and invented later in order further to incriminate the accused. As I have already stated, I therefore accept the accused's version of the incident. It seems that they were first foully

abused by the deceased and being gravely provoked and also threatened, they seized the axes, both of Basappa and the deceased, that Basappa ran away and that thereupon they belaboured the deceased until they had killed him. I have no doubt whatever that both the accused were gravely and suddenly provoked within the meaning of the exception to section 300 of the Indian Penal Code. There is no doubt that the threatening attitude of the deceased and possibly of Basappa with their axes raised a reasonable suspicion in the minds of the accused that they would suffer death or grievous hurt from this assault. They were therefore justified in wrestling with the deceased in order to protect themselves. Section 99 of the Code, however, states that in these circumstances the accused ought not to have caused more injury than was necessary in order to render themselves safe from the assault. I think they exceeded their right of private defence on this occasion. In mitigation of their conduct, however, it must be realised that they had been provoked to such an extent that as they admit they were in an ungovernable rage. Moreover, in this connection, no sympathy whatever can be extended to the deceased.

4. All the four assessors are of the opinion that the two accused are guilty of culpable homicide not amounting to murder and are not guilty of the misappropriation of the rings. I agree with them. In my opinion, having regard to all the circumstances of this case, I think the accused should only receive a light punichment, in view of the threatened assault and the very serious nature of the provocation they had received. They are acquitted of the charge under section 404, I.P.C. and both of them convicted of an offence of culpable homicide not amounting to murder. I sentence each of them to 3 months' rigorous imprisonment under section 304, Indian Penal Code.

Sd. R.W.H.Davies.
September 18, 1946. Sessions Judge.

Tyoed by, Compared by, "True copy".

Sectioner. Sectioner. Sheristedar.

BIJAPUR

abt 117 -

Applied for on 28th (Twenty eighth) October 1946.

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Sessions Case No 29/1946.

Exh. 28.

Opinion of Assessors.

1. Mr. B.K.Kop:-

Q: What is your opinion ?

A: Guilty of culpable homicide not amounting to murder.

2. Mr. V.K.Kautal:-

Q: What is your opinion ?

A: Guilty of culpable homicide not amounting to murder.

3. Mr. B.V.Sulakhe:-

Q: What is your opinion ?

A: I am of the same opinion.

4. Mr. H.K.Shaha:-

Q: What is your opinion ?

A: I am of the same opinion.

18-9-1946. Sd. R.V.H.Davies.

Sessions Judge.

Typed by,

Sectioner.

"True copy".

Compared by,

Sectioner.

Sheristedar.

BIJAPUR

119/275

Judgment recorded by the High Court in criminal revision application No. 50 of 1947 in the case of Rudrawa kom Shivangouda No. 1 and others (orig. complainants Nos 2+3) v. Basappa Sangappa Jigalpur No. 1 and another (orig. accused).

Counsel Dr. B.R.Ambedkar with Mr. N.M.Hungund Advocate for the Petitioners,
Mr. S.G.Patwardhan, Government Pleader, for the Crown,
Counsel Mr. Purshottam Trikamdas with Mr. B.M.Kalagat Advocate for the Opponents.

Coram:- Chagla and Gajendragadkar, JJ.

8th April 1947.

Oral Judgment (Per Chagla, J.):-

In this case the two Accused were charged under section 302 and section 404, Indian Penal Code, and tried by the learned Sessions Judge, Bijapur, with the aid of Assessors, acquitted of the charge under section 404 and convicted of an offence under section 304 of the Indian Penal Code and sentenced to three months' rigorous imprisonment.

The Petitioners applied for enhancement of the sentence passed by the learned Sessions Judge, and the learned Chief Justice and Mr. Justice Lokur were pleased on the 20th of January 1947 to issue a rule. When the rule came on for hearing, Mr. Purshottam very rightly [illegible] our attention to the decision of this Court reported i[n] In Re : Nagji Dula, (1924) I.L.R. 48 Bombay page 358. A Bench consisting of Sir Norman Macleod, Chief Justice and Mr. Justice Shah held that under the Code o[f] Crimin[al] Procedure a private party is not entitled to apply to t[he] High Court to enhance a sentence passed by subordinate Court; he can only draw the attention of Government to t[he] sentence; and in his judgment the learned Chief Justice said:

> "We think it should be definitely ruled as a matter of practice that no such application by a complainant to enhance a sentence should be entertained."

Apparently, with respect, the attention of the learned Chief Justice and Mr. Justice Lokur was not drawn to this decision We propose to follow this practice because in our opinion it is a salutary practice. But as the learned Chief Justice points out it is always open to the Court to take action of its own motion if its attention is drawn to a case which requires enhancement of sentence. We. therefore, rule that Dr. Ambedkar who appears for the Petitioners is not entitled to be heard. We also hold that his application for enhancement should not have been granted. The proper procedure was that when he came to this Court on his application, his application should have been dismissed, and the Court of its own motion should have issued a rule for ehhancement if it was satisfied that the case required reconsideration. Instead of going through the technicality of dismissing Dr. Ambedkar's application and issueing a fresh rule for enhancement, we have treated this application as a rule issued by us for enhancement of sentence because both the learned Government Pleader and the Accused have had ample notice of this rule for enhancement.

The prosecution case was that on the day when the offence took place the two Accused were returning from their fields and on the way they found Mallangouda and his companion Basappa. The prosecution alleged that the Accused were armed with axes, that they attacked Mallangouda and inflicted severe injuries on him with the result that he died. They then removed four rings from the fingers of the Deceased After the incident the Accused went to the Village Chavdi, reported the matter and admitted having caused the death of Mallangouda.

We are compelled to observe in this case that the

learned sessions Judge has given a most perfunctory judgment and has not applied his mind at all to the fact and issues that arose in the case. He seemed to have been moved by the consideration that no sympathy whatever could be extended to the Deceased when the Deceased was beyond the pale of his sympathy. The learned Sessions Judge accepted the Assessors' opinion that the offence did not fall under section 302 but fell under sec. 304 of the Indian Penal Code. But the learned Judge did not even take the trouble to ascertain from the Assessors whether the conviction should be under the first part of under the second part of section 304; and even in his judgment when he passed the sentence, he does not advert to the part of the section under which he was convicting and sentencing the Accused. The Learned Sessions Judge was of the opinion that there was grave and sudden provocation on the part of the Deceased which reduced the offence from that of murder to one of culpable homicide not amounting to murder. But we do not find in his judgment any clear finding as to what, according to him, was the grave and sudden provocation. We also find from the Hosannama that although the prosecution wanted to lead evidence of certain witnesses, the learned Judge prevented the prosecution from leading that evidence on the ground that they related to matters which were not disputed by the defence. In our opinion it is not advisable that in a case of such serious importance a Judge should take the conduct of the case into his own hands. The prosecution is there, presumably knowing its business, to lead proper evidence on behalf of the Crown and it is the duty of the Judge to allow all material evidence to be led and make up his mind after he has heard that evidence and the evidence which the defence

might lead or after taking into consideration the contentions of the defence. But a Judge should not permit his sympathy for one side or the other to outrun his judgment. We also find from the record that while the prosecution evidence was being led, the learned Sessions Judge practically took the witnesses into his own hands and examined them rather than permitting the Public Prosecutor to examine his own witnesses.

Now with regard to the question of grave and sudden provocation, the one witness whom the learned Sessions Judge has believed is the Kulkarni. He considers him as an independent witness. Now when we turn to his evidence, we find that he states that when he went to the Chavdi on the day on which the offence was committed he found accused No. 1 and accused No. 2 there. Accused No. 1 had a stick and an axe and Accused No. 2 had an axe only. Then, according to the Kulkarni, Accused No. 1 told him that Mallangouda, the Deceased, had threatened to ruin his wife and that accordingly he (the Accused) had struck Mallangouda. Accused No. 2 also admitted striking the Deceased. According to the Kulkarni, he judged from this that this threat of dishonour to his wife has caused this assault. Therefore, according to this witness, the grave and sudden provocation was the abuse of his wife or a threat to his wife's chastity which was rather remote because the wife was not there.

Then we have a statement made by the Accused to the police Patil which the learned Sessions Judge surprisingly ruled out in his judgment as not relevant evidence and yet has admitted it on the record of the case. In this report of the Police Patil the Accused do say that both Mallangouda and Basappa came with axes to kill them and thinking that they would die, they snatched the axes and themselves

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beat Mallangouda. But what the learned Sessions Judge has in terms found is that he accepts the version of the Accused as t what happened as correct as against the prosecution evidence and except for the Kulkarni he finds the prosecution evidence unreliable; and on that statement of the Accused he holds that there was grave and sudden provocation. He also comes to the conclusion that the Accused had exceeded their right of privat defence although, to use his own words, mildly. Therefore let us turn to the statement of the Accused to find out what the version of the incident was according to them. It is clear from the statement of the accused that when they inflicted the injuries on the Deceased, Basappa had left. The Deceased was unarmed and both the Accused had axes in their hands. It is true, as Mr Purshottam has pointed out, the finding of the learned Sessions Judge is that the axes belonged to the Deceased and Basappa. We accept that finding. But even so, at the crucial moment when the injuries were inflicted, we find on the one side the two Accused armed with deadly weapons like axes and on the other hand the solitary individual, the Deceased, wholly unarmed. It is also important to note what the injuries inflicted on the Deceased were. The Medical Report says that there were 14 injuries inflicted on the Deceased and his head was severed from his trunk. It is also important to note that there was not the slightest injury on either of the accused - neither a bruise nor an abrasion. Now it is clear that if an accused person wishes to come under exception 2 to section 300 of the Indian Penal Code, he must not inflict more harm than is necessary for the purpose of his defence. It is difficult to see how at the stage when the two accused inflicted these injuries upon the Deceased any harm at all was required to be inflicted for the purpose of their defence. Whatever apprehension they might have had at the time when the Deceased abused them and threatened them, once the Deceased

and his companion had been disarmed and the two Accused themselves became armed, no question of private defence could possibly arise. Mr. Purshottam has asked us not to weigh this in golden scales; but even if we were to weigh it in scales of a baser metal, we fail to see how it can be said with any justification, as the learned Sessions Judge has said, that the accused exceeded their right of self-defence only mildly. Even with regard to the provocation, at the highest it comes to a filthy abuse and a threatened assault. We do not propose to interfere with the conviction because the learned Sessions Judge has found that the offence of which the accused were guilty was not that of murder but the lesser offence of culpable homicide not amounting to murder; but as the learned Judge has not applied his mind under which part of section 304 the offence falls, we have got to consider that question.

In this case it is difficult to hold that there was no intention on the part of the accused to cause the death of the Deceased. Intention can after all be judged from various facts - from the weapon used, from the injuries inflicted and so on; and considering that the weapon used was an axe and considering the nature of the injuries, especially the severing of the head from the trunk, it is difficult to hold that the intention of the accused could have been any other than the intention to cause the death of the Deceased. Even if that intention was not there, there certainly was an intention of causing such bodily injury as was likely to cause death. Mr Purshottam says that they attacked the Deceased in a fit of rage and that they did it because there was provocation; but it is because of the provocation that the offence is reduced to the lesser offence of culpable homicide not amounting to murder. But still we have to determine whether death was caused with intention or

merely with knowledge. A man in a temper because he is grave and suddenly provoked may intend to kill his assailant or his opponent. The law reduces the offences to that of culpable homicide not amounting to murder; but the law also says that the accused intended to cause the death of the Deceased and the offence falls under the first part of section 304 of the Indian Penal Code. Even looking to the statements of the accused themselves, they say: "We caught Mallangouda and murdered him". On these facts, we hold that the Accused must be convicted of an offence under section 304, first part, of the Indian penal Code.

As to the sentence Mr Purshottam has urged that although Government were moved by the petitioners, the Government refused to take any action in the matter. All that we can say is that we are surprised at the attitude of Government. We could not have thought of a better case than this in which Government should have moved the Court. The ways of Government are inscrutable; and we do not frankly understand what led Government not to approach the High Court. But after all it is not for Government to decide whether a sentence should be enhanced or not. It is for this Court to consider the propriety and the adequacy of the sentences passed by the lower Court and we are in no way fettered by the opinion taken by Government. In our opinion the sentence passed by the learned Sessions Judge is totally inadequate. In a gross case like this, to have passed a sentance of three months' rigorous imprisonment seems to us absolutely unjustifiable. We, therefore, enhance the sentence and pass the sentence of seven years' rigorous imprisonment upon both the Accused.

By the Court,
Sd/- S.H.Belavadi
Deputy Registrar.

NK.